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No._____

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

A. PAUL SCHWENKE,
Petitioner,

vs.

UTAH STATE BAR,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UTAH SUPREME COURT.

PETITION FOR A WRIT OF CERTIORARI

A. PAUL SCHWENKE, Pro Se
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Petitioner

VOLUME THREE

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BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

Hearing Panel:
Robert Wallace, Chair
E. Gregg Tobler
Sandra Wilkins

In The Matter of the
Complaint by

RON AND CAREN SERR

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION
OF DISCIPLINE

against

F-322

A. PAUL SCHWENKE
DOB: 10-12-51
ADM: 05-09-83
)

This matter came on for a Sanctions Hearing pursuant to notice on March 2, 1992, before a Disciplinary Hearing Panel of the Ethics and Discipline Committee of the Utah State Bar. The Office of Bar Counsel was represented by Wendell K. Smith, Assistant Bar Counsel, and the Respondent was

represented himself. The Hearing Panel having heard testimony from Caren Serr and Samuel King, the arguments of Counsel, and being otherwise fully advised in the premises, and pursuant to Rule XII(e) of the Procedures of Discipline of the Utah State Bar hereby enters Findings, Conclusions, and Recommendations as follows:

FINDINGS OF FACT

1. At all times herein the Respondent A. Paul Schwenke was an attorney licensed to practice law in the State of Utah.

2. In June, 1985, the Respondent, and his associate Bruce J. Udall, entered into a contract with the Complainant, Caren Serr, to represent her in the recovery of damages for injuries she sustained in an automobile accident on November 16, 1983. The contract

provided that the Respondent and his associate were entitled to an attorney fee of 28% of any recovery.

3. The subject accident involved two cars colliding at an intersection, one driven by a party named Collard and insured by Western Fire, and the other driven by a party named Whitehead and insured by Colonial Penn. Total policy limits were $200,000.00. It appeared that both Collard and Whitehead were at fault in the original collision and that the Complainant was without fault in that subsequent to the initial collision their vehicles struck her vehicle.

4. On September 23, 1985, Schwenke settled the Complainant's claim against Whitehead and Collard. In negotiating the

settlement, advising her to accept the settlement, and collecting and disbursing settlement proceeds the Respondent Schwenke was the lead attorney, taking all steps and making all representations necessary to effectuate the settlement, with his associate Bruce J. Udall being more or less passive.

5. Respondent advised the Complainant that the most he could obtain for her was a $26,763.75 cash payment with which he would purchase from an insurance company an annuity that would provide her with a $250 a month payment for her life. The defendants' insurers would also pay her outstanding medical bills of $11,179.96 and her attorney fees.

6. Complainant reasonably relied on the

advice given her by Schwenke and accepted this offer and signed the settlement documents.

7. On or about September 23, 1985, Complainant endorsed a check issued by Western Fire for $27,847.88, as well as a second check also from Western Fire for an additional $13,381.88. The Respondent advised her that these checks represented the monies to purchase the annuity and to pay the balance due on her medical bills.

8. Respondent never purchased the annuity, but rather purchased a bond in his own name. The bond was eventually foreclosed upon as a result of Respondent's personal debt.

9. Over the next two years, Schwenke sporadically paid Complainant from his own

monies a sum Of $250 a month for a total of $4,500.00 representing to the Complainant that he was in fact forwarding to her the insurance annuity checks. Complainant has not received any $250.00 payments since sometime in 1987.

10. The Complainant has no annuity and has been irreparably harmed thereby.

11. Complainant relied on Schwenke's statements that he would obtain the annuity when the settlement was made and that he had obtained the annuity.

12. On or about September 25, 1985, Colonial Penn delivered two checks to defendant Schwenke for the identical sums that Western Fire issued, to wit, $27,847.88 and a separate check for $13,381.88. Schwenke failed to advise Complainant about

these funds.

13. Schwenke deposited the checks into his own account in his own name and either forged or caused to have forged Complainant~s signature on both checks.

14. The actual money that Complainant received from the settlement was the $4,500.00 paid to her under the pretense of an annuity over a two-year period, and $11,310 in cash at the time of settlement, for a total of $15,810.

15. Total cash paid by the insurers was $82,359.52. In addition, the insurers paid Complainant's medical expenses of $11,179.96; for a total benefit to Complainant, if properly disbursed, of $93,539.48.

16. The maximum fee Respondent and his

associate Udall would have been entitled to was $26,191.05, that is, 28% of $93,539.48.

17. Respondent Schwenke actually received $65,049.52.

18. In a Stipulation of September 19, 1989, entered in the Third District Court case of Serr vs. Schwenke and Bruce Udall, Civil No. 88-01441, Schwenke confessed to a judgment in fraud, not dischargeable in bankruptcy in the sum of $100,000, less credits for cash Respondent paid her after September 19, 1989, and the proceeds from two parcels of land, one in Weber County, Utah, and the other in Duchesne County, Utah which according to the terms of the Stipulation were to be deeded to the Complainant.

19. Subsequent to the Stipulation,

Schwenke paid $250 in cash, did not convey the Weber County property, but did convey the Duchesne County property valued at $2,500.

20. The Stipulation provided that the findings of this judgment were to state fraud with particularity for the purpose of avoiding a bankruptcy discharge of the judgment by Schwenke.

21. At the time Schwenke settled Complainant's case, he was in bankruptcy.

22. The $100,000 stipulated judgment entered by the Third District Court in Serr vs. Schwenke and Udall, was based upon fraud which included damages for the loss of the money necessary for Caren Serr to have the needed rehabilitative surgery, for money converted by Respondent which was paid by

the insurers for the loss of her future earnings, emotional distress, punitive damages, costs and attorneys' fees.

23. On or about August 11, 1987, Complainant filed the original letter of complaint with the Office of Bar Counsel.

24. The Formal Complaint in this action was served on Respondent on December 4, 1990, by mailing a copy thereof to Respondent by certified mail to his last known address as shown by the official roster of attorneys of the Bar.

25. Notice of Intent to Default was served on Respondent on January 11, 1991 by mailing a copy thereof to Respondent by certified mail to his last known address as shown by the official roster of attorneys of the Bar.

26. Default was entered against Respondent by the Executive Director of the Utah State Bar on March 19, 1991. A copy thereof was sent to Respondent by certified mail to his last known address as shown by the official roster of attorneys of the Bar.

27. Respondent's last know address as shown on the official roster of Attorneys of the Utah State Bar at the time of service of the Formal Complaint, Notice of Intent to Default and Default entered herein was 165 South West Temple, #300, Salt Lake City, UT 84010 and is the last address Respondent has provided to the Utah State Bar.

28. The Office of Bar Counsel of the Utah State Bar attempted to locate the actual whereabouts of Respondent and having been informed by Respondent's former

associate that he was living at 5233 Holbrook Drive, Las Vegas, NV 89103 mailed the Notice of Hearing pertaining to this Sanctions Hearing to that address. Respondent appeared at the Hearing.

29. Respondent is currently residing at 106 magic Drive, Murray, UT 84107-8209 and has informed the Hearing Panel he will be residing there pending the resolution of other legal proceedings currently pending against him in the State of Utah.

Based on the above Findings, the Panel makes the following:

CONCLUSIONS OF LAW

1. Respondent was duly and properly served with the Formal Complaint in the above-entitled action in accordance with the provisions of Rule XI(b) of the Procedures of Discipline of the Utah State Bar. Default on the Formal Complaint was properly taken and judgment properly entered against Respondent by the Executive Director of the Utah State Bar.

2. Respondent has violated the following Rules of Professional Conduct as approved by the Utah Supreme Court on 2/19/71:

A) Canon 1, DR 1-102 MISCONDUCT

A) A lawyer shall not:

3) Engage in illegal conduct

involving moral turpitude; and/or

4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation; and/or

6) Engage in any other conduct that adversely reflects on his fitness to practice law.

B) Canon 1, DR 9-102 PRESERVING IDENTITY OF FUNDS AND PROPERTY OF CLIENT:

B) A lawyer shall:

(1) Promptly notify a client of the receipt of his funds, securities, or other properties and/or

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of a lawyer and

render appropriate accounts to his client regarding them and/or

(4) Promptly pay or delivery to the client as requested by a client, the funds, securities, or other properties in the possession of a lawyer which a client is entitled to receive.

Based on the above conclusions, the Panel makes the following:

RECOMMENDATION

The Hearing Panel in making its recommendation relies upon the following factors in aggravation and mitigation:

Aggravation:

1. Respondent's prior disciplinary record in Formal Complaint F-241 wherein he

agreed to represent his clients in the placement of Samoan children in the United States. After receiving fees in the amount of $5,000.00 per child, for five children, he failed to provide the agreed legal services in at least two of the adoptions requiring his clients to expend additional sums to complete the adoptions themselves. In substance he occupies for which no meaningful legal services were performed. This conduct violated Cannon 2, DR 2-106(A) currently Rule 8.4, MISCONDUCT, of the Rules of Professional Conduct of the Utah State Bar. On May 18, 1990, the Supreme Court suspended Respondent from the practice of Law for 30 days and required that he make restitution to his clients in the sum of $1,200.00. A copy of Findings, Conclusions

and Recommendations of the Hearing Panel and the Order of Discipline are attached hereto as Exhibit A and incorporated herein by reference.

2. Respondent's prior disciplinary record in F-281 wherein Respondent purchased certain real property on or about March 24, 1986 and on that same day filed a Chapter 11 Bankruptcy Petition on behalf of the seller of the property. Subsequent to filing the Bankruptcy, Respondent caused the seller to deed the property to his own wife and thereafter at the Bankruptcy proceedings misrepresented to the Court that he did not own any interest in the real property. Respondent's conduct violated Cannon 1, DR 1-102(A)(4), currently Rule 8.4(c), MISCONDUCT, Cannon 1 DR 1-102(A)(5),

currently Rule 8.4(d), MISCONDUCT, Cannon 5, DR 5 -101(A), currently Rule 1.7, CONFLICT OF INTEREST, Cannon 5, DR. (A), currently Rule 1.8, CONFLICT OF INTEREST, Cannon 7-102(A)(3), currently Rule 3.1, MERITORIOUS CLAIMS AND CONTENTIONS, Cannon 7, DR 7-102(A)(5), currently 3.1, MERITORIOUS CLAIMS AND CONTENTIONS, and Cannon 7, DR 7-102(A)(7), currently Rule 3.1, MERITORIOUS CLAIMS AND CONTENTIONS of the Rules of Professional Conduct of the Utah State Bar. On March 21, 1991 the Supreme Court suspended Respondent from the practice of law for a period of one year. A copy of the Findings, Conclusions and Recommendations of the Hearing Panel and the Order of Discipline are attached hereto as Exhibit B and incorporated herein by reference.

3. The actions of Respondent were improper. Such actions include, taking money due *his client*, Caren Serr, and using it for his personal use to the substantial detriment of his client, keeping from his client the truth concerning the actual amount of settlement, failing to purchase an annuity for his client as agreed by him, luring his client into believing that such an annuity had been purchased by telling her so and by periodically paying her $250.00. .

4. The Panel recognizes that acts currently as issue preceded the prior disciplinary proceeding, but such conduct still shows a pattern of improper conduct. The pattern of misconduct exhibited by Respondent in this matter and in F which indicate his propensity to dishonestly take

his client~s property for his personal use and benefit.

5. Respondent's refusal to acknowledge the wrongful nature of his misconduct.

6. The vulnerability of Respondent's client who was the victim of his misconduct and who is now permanently disabled because she does not have the funds to obtain corrective surgery. Funds she would have had if they had not been taken by Respondent.

Mitigation: Relatively young inexperienced lawyer.

Based on the foregoing, the Hearing Panel, recommends the following discipline:

1. Disbarment.

2. Respondent shall pay the reasonable costs incurred to the Office of Bar Counsel for prosecuting this action in

the amount of $323.76.

3. Respondent shall make full restitution to Caren Serr in the amount of $97,250.00, plus interest thereon at the rate of 12% per annum from the date of November 5, 1990, as a condition precedent to readmission to the Bar. This is the amount he agreed to pay Mrs. Serr in the stipulated judgment in a collateral civil matter between the parties filed in the Third Judicial District Court, Civil Case No. 88-01441.

4. In the event any claims are paid by the Client Security Fund, due to Respondent's professional misconduct in this or any other matter, restitution to the Client Security Fund shall also be made in full as a condition precedent to readmission to the Bar.

5. It is further recommended that the Order of Discipline prohibit Respondent, upon the effective date of his disbarment, from maintaining a presence in or occupying an office where the practice of law is conducted, that he be directed to take such actions necessary to cause the removal of any indicia as an FINDINGS, counselor at law, legal assistant, paralegal, law clerk or similar title, and in all other respects refrain from acting in any such capacities.

DATED this day of ,

1992.

DISCIPLINARY

HEARING PANEL

By:_____

Robert

Wallace, Chair

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Findings, Conclusions and Recommendation was mailed certified mail return receipt requested, postal certificate number P 879 345 419, to A. Paul Schwenke, Attorney at Law at 106 Magic Drive, Murray, UT 84107-8209 on this _____day of _____, 1992.

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR
Disciplinary Hearing Panel:
Robert Wallace, Chair
E. Gregg Tobler
Sandra Wilkins

In the Matter of the Complaint by	ORDER AFFIRMING FINDINGS OF FACT CONCLUSIONS OF LAW AND
RON AND CAREN SERR	RECOMMENDATION OF DISCIPLINE
against	
	F-322
A. PAUL SCHWENKE DOB: 10-12-51 ADM: 05-09-83	

Pursuant to Rule XII(e) of the Procedures of Discipline, the Board has reviewed the Findings of Fact, Conclusions of Law and Recommendation of Discipline of the Disciplinary Hearing Panel. It hereby affirms those determinations, adopts them as its own, and incorporates them by reference into this order.

Dated this 4th day of May, 1992.

BOARD OF BAR COMMISSIONERS

By_____
James Z. Davis
President

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Order was mailed to A. Paul Schwenke Attorney at Law at 106 Magic Drive, Murray, UT 84107-8209 on this 11th day of May, 1992.

_____

BOARD OF BAR COMMISSIONERS
OF THE UTAH STATE BAR.

In the Matter of the Complaint
by RON AND CAREN SERR,

against

MOTION FOR
RECONSIDERATION

A. PAUL SCHWENKE,
DOB: 10-12-51
ADM: 05-09-83

Case Number F-322

Respondent.

Respondent, A. Paul Schwenke, pursuant to Rule VII(f), Procedures o~ Discipline of the Utah State Bar, respectfully requests a reconsideration of the Findings of Fact, Conclusions of Law, and Recommendation of Discipline, submitted to the Board in the above captioned matter. The reasons for reconsideration, legal arguments in support of modification, and proposed modification will be set out fully in a supporting memorandum of law to be timely filed for

consideration by the Board in its next meeting.

Petitioner requests oral argument.

Dated this 5 day of May, 1992.

_____

A. Paul Schwenke

CERTIFICATE OF HAND-DELIVERY

I hereby certify that I hand-delivered a copy of the foregoing request for reconsideration to or. Wendell K. Smith, Assistant bar Counsel, 645 South 200 East, Salt Lake City, Utah this 5 day of May, 1992.

_____

A. Paul Schwenke

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In the Matter of the Complaint

by RON AND CAREN SERR,
against
A. PAUL SCHWENKE,
DOB: 10-12-51
ADM: 05-09-83
Respondent.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION FOR RECONSIDERATION

Case Number F-322

Respondent, A. Paul Schwenke, respectfully submits this Memorandum of Points and Authorities in support of Respondent's's Motion for Reconsideration of the Hearing Panel's proposed Findings of Fact, Conclusions of Law and Recommendation of Discipline.

PRELIMINARY STATEMENT

The respondent was not served with the

Summons and Complaint. The respondent was not served with any of the pleadings subsequent to the alleged service of the summons and complaint. Accordingly, the respondent did not receive actual notice of any of the proceedings in this matter except for the Notice of Sanctions Hearing set for March 2, 1992.

The respondent appeared at the March 2, 1992, sanctions hearing and objected to the deficient service of process and lack of actual notice to the respondent. The Hearing Panel (hereafter referred to as "Panel") denied respondent's objection on the basis that the service met the requirements of Rule XI(b), Procedures of Discipline of the Utah State Bar (hereafter referred to as "Procedures of

Discipline").[1] The Panel refused to consider whether or not the service of process violated respondent's due process rights.[2]

The respondent will demonstrate, conclusively, in this memorandum that his due process rights were denied or violated in the proceedings leading up to the proposed Findings, Conclusions and Recommendation now before the Board of Bar Commissioners (hereafter referred to as

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1. Please note under Argument, Point One (2), infra., the Panel's conclusion that the service of process comports with RuleXI(b) of the Procedures of Discipline was clearly wrong.

2. It is clear and plain error if the Commission, likewise, fails to consider the apparent violations of respondent's due process rights. Therefore, the petitioner urges the commission to closely and carefully consider the petitioner's argument on the violation accordingly.

"Commission").

STATEMENT OF RELEVANT FACTS.

1. The respondent's address in the official roster of attorneys of the Bar is P.O. Box 578S3, Murray, Utah, 84107. The respondent, although, absent from the State during all relevant times herein, maintained said post office box address until March 27, 1992.[3]

2. The mailing certificate of the summons and complaint in the above captioned matter shows that said pleadings were served by certified mail on December 6, 1990, upon a Norma Davis, at 165 South West Temple,

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3. Please see the original affidavit of respondent, paragraph 7. The affidavit of is attached hereto as Exhibit #1, and incorporated herein by reference.

Suite 300, Salt Lake City, Utah 84101.[4]

3. The respondent do not know a Norma Davis. Norma Davis was never an agent of the respondent nor was she ever authorized to accept service of process on respondent's behalf.[5]

4. The Utah State Bar was advised in writing on March 27, 1991 of respondent's absence from the State of Utah.[6]

5. The respondent has been in and out

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4. Please see a true and exact copy of said certificate and the return receipt showing that the pleadings were allegedly received by a Norma Davis, attached hereto as Exhibit #2, and incorporated herein by this reference.

5. Petitioner's affidavit, paragraph 5. Please also see the affidavit of Jamis M. Johnson, a true and exact copy is attached hereto as Exhibit #3, and incorporated herein by this reference.

6. Johnson affidavit, paragraph 4.

of the State of Utah since December, 1991, and has re-established a resident in the State on April 16, 1992.

ARGUMENT

Point One

THE PROCEDURE LEADING UP TO THE PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF DISCIPLINE IN THIS MATTER VIOLATED RESPONDENT' RIGHTS TO DUE PROCESS.

The service of the summons and complaint must comport with the requirements of due process. Otherwise, any orders or judgments, that flow from or resulted from proceedings commenced by a de~defective service of the summons and complaint, are null and void.[7] The service of the summons

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7. W. S. G. Co. v. Redevelopment, 802 P. 2d 755, 765 (Utah App. 1990) citing

and complaint here is defective in at least two respects. The service of the summons and complaint was, (1) not reasonably calculated to apprise the respondent, and (2) the service of the summons and complaint was not made pursuant to rule XI(b), Procedures of Discipline.

(1). The service of the summons and complaint was not reasonably calculated to apiaries the respondent.

Due process at a minimum requires that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their

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Murray City Redevelopment, 598 P. 2d 1352, 1356 (Okla. 1985).

objections."[8] The supreme court has construed the "under the circumstance" language to "embody the idea that plaintiff must act diligently and take reasonable steps in attempting to give the defendant actual notice of the proceeding as are reasonably practicable."[9] "Diligence" means "that 'all reasonable means ... have been exhausted' in trying to determine whether a defendant is a nonresident or a departed resident and what the defendant's last known

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8. Mulane v. Central Hanover Bank, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L.Ed. 865 (1950). Followed in Carlson v. Boss, 740 P.2d 1269 (Utah 1987); Copper State Thrift and Laon v. Bruno, 735 P.2d 387 (Utah App. 1987); Guenther v. Guenther, 749 P.2d 628 (Utah 1988); W. & G. Co. v. Redevelopment Agency, supra at 761.

9. Carlson v. Bos, 740 P. 2d 1269, 1275 (Utah 1987).

address is.[10]

"'Last known address'" means the last known address as far as it is reasonably possible to ascertain it".[11] "Under rare circumstances this may be the address last known to the plaintiff, but normally it would be 'the address of the defendant so far as it is known, that is, by those who under ordinary circumstance of life would know it.'"[12] The supreme court also offered some examples of efforts that could be taken by the plaintiff, or Bar Counsel here, to

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10. Carlson v. Bos, supra, at 1280, citing Kintigh v. Elliott, 570 P. 2d 659, 662 (Or. 1977); Ter Har v. Backus, 487 P2d 660, 662 (Or. 1971).

11. Id. citing Medeiros v. Kaye, 331 A.2d 351, 352, (Conn. 1974).

12. Id. citing D'Occhio v. Connecticut Real Estate Commission, 455 A.2d 833, 838 (Conn. 1983).

ascertain the defendant~s (respondent here) last known address.

This may require a plaintiff to

> make an investigation. .For example, a plaintiff might make inquiry at the post office for the address last known to the plaintiff or inquire with the defendant's last known employer, or with public utility companies in the area of the defendant's address last known to the plaintiff, of defendant's neighbors in the area of the address last known to the plaintiff, and the defendant's friends and relatives.[13]

Against the constitutional requirements of Mullane and as clarified by the supreme court in Carlson v. Bos, the service of the summons and complaint here is totally inadequate and thus violative of respondent's due process rights under

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13. Id.

the Utah Constitution and under the 14th Amendment to the United States Constitution.

Bar counsel simply mailed a copy of the summons and complaint to an address known to Bar Counsel, without any inquiry to see if that address was the respondent's last known address. A simple telephone call by Bar Counsel would have revealed that respondent had not had an office at said address since November, 1990.

Bar Counsel was put on notice after he received the certified mail return receipt which showed that the summons and complaint was not received by the respondent, but instead, was received by a Norma Davis. A simple inquiry would have revealed that Norma Davis was a temporary receptionist,

filling in for the regular receptionist at an office complex shared by several businesses, both lawyers and non lawyers. That Norma Davis worked for the landlord and not for anyone of the tenants. That Norma Davis was at no time, an agent for the respondent. That Norma Davis certainly was not authorized to accept service of process on behalf of the respondent.

Finally, and in addition to the certified mail receipt which put Bar Counsel on notice that the respondent did not receive the copy of the summons and complaint, Bar Counsel was also advise by affidavit on March 27, 1991, that the respondent was out of the State and the respondent had not had an office at the address where the summons and complaint was

allegedly served during the time of the alleged service. It seems that the diligence required for due process imposed a duty upon Bar Counsel to do more after acquiring actual knowledge of the absence of the respondent from the State and particularly the absence of the respondent from the address upon which the summons and complaint was served, at the time of the alleged service. Bar Counsel did no more, but simply send all pleading and notices to the same former office address of the respondent.

Accordingly, the service of the summons and complaint was not reasonably calculated under the circumstances to apprize respondent of the proceedings. The respondent was accordingly not apprized of

the proceedings against him. The respondent's due process rights have been denied or violated and the Commission must take corrective measures; including, dismissing the proposed Findings of Fact, Conclusions of Law and recommendation of Discipline, vacating the default entered against the respondent and ordering Bar Counsel to effectuate adequate and proper service of the summons and complaint herein.

(2). The service of the summons and complaint was not made pursuant to rule XI(b). of the Procedures of Discipline.

Additionally, if the rules prescribed a manner of service of process, than the Commission must substantially comply with

such method .[14] Rule XI(b), Procedures of Discipline requires, in part, that,

> Bar counsel shall cause to be served upon the attorney... a copy of the Formal Committee Complaint and a summons,... ...Service shall be made personally upon the attorney in question or by registered or certified mail to the last known address as shown by the official roster of attorneys of the Bar. (Emphasis added).

The rule specifically requires that the summons and complaint must be served upon the attorney and no one else. Please note that the language of the rule is not permissive. The rule clearly contemplates giving the attorney actual notice of the proceedings against him either by personal service or by the attorney actually

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14. Van Nort v. Davis, 800 p.2d 1082, 1084 (Okl. App. 1990).

receiving the summons and complaint through the mail and personally signing a return receipt that he received the same.[15]

Bar counsel failed to comply with the mandate of Rule XI(b) in the following particulars: (1) Bar Counsel failed to serve the summons and complaint upon respondent on the respondent by personal service. 2) Bar Counsel failed to serve the summons and complaint upon respondent by registered or certified mail but instead served the summons and complaint upon a Norma Davis. (2) Bar Counsel failed to

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15. If someone other than the attorney signs the return receipt, than the service must fail because it has not been served upon the attorney as mandated by the rule. It is a different matter, however, if the person that signed the return receipt was specifically authorized by the attorney to accept service of process on his behalf. But, that is not the situation here.

serve the summons and complaint upon the respondent by registered or certified mail to the respondent's address as shown on the roster of attorneys of the Bar. The panel's failure to follow a prescribed manner of service makes the process fatally defective.[16]

The service of the summons and complaint was not made pursuant to the prescribed manner set forth under Rule XI(b), Procedures of Discipline. If Bar Counsel had followed Rule XI(b), respondent would have been apprized of the proceedings against him. Bar Counsel's failure to comply with Rule XI(b) denied the respondent his right to be apprized of the proceedings

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16. VanNort v. Davis, supra.

against him. The respondent's due process rights have been denied or violated and the Commission must take corrective measures; including, dismissing the proposed Findings of Fact, Conclusions of Law and Recommendation of Discipline, vacating the default entered against the respondent and ordering Bar Counsel to effectuate adequate and proper service of the summons and complaint herein.

POINT TWO

THE SANCTION OF DISBARMENT IS INAPPROPRIATE UNDER THE CIRCUMSTANCES AND DISCRIMINATORY.

The proposed sanctions of disbarment is totally inappropriate and tantamount to disparate treatment in light of the Commission's disciplinary recommendation in another related matter involving the same

transaction. Mr. Bruce J. Udall was respondent~s partner at the time of the alleged violation of the Code of Professional Responsibility.

Mr. Bruce J. Udall was charged under the same facts and arising from the same transaction that the respondent is being presently charged.[17] Bar Counsel resolved Mr. Bruce J. Udall's matter by stipulation to a two year probation.[18] Even the complainant charged Mr. Bruce J. Udall with greater misconduct than respondent[19] and yet

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17. Ron & Caren Serr v. Udall, F-382

18. In re Bruce Udall, supreme Court docket no. 910264

19. Please see a true and exact copy of a November 5, 1987 letter from Ron Serr to Christine Burdick attached hereto as Exhibit #4, and incorporated herein by this reference.

Bar Counsel stipulated to probation while pursuing disbarment against the respondent. The only difference between the facts of Mr. Bruce J. Udall's complaint and the respondent's complaint is the color of their skin. Perhaps if the respondent had white skin, he may have also gotten a stipulation to a two year probation.

Additionally, the respondent was criminal prosecuted for a second degree felony as a result if the same facts and circumstances involved here. If the respondent was convicted, disbarment would have been the resulting disciplinary sanction. It seems to the respondent that a unanimous exoneration by a jury must merit something less than the sanction for a conviction.

CONCLUSION

The service of the summons and complaint was not reasonably calculated, under the circumstances, to apprize the respondent of the proceedings against him. The respondent was accordingly not apprized. The applicable rule contemplates that the respondent receive actual notice of the proceedings against him. Bar Counsel failed to comply with the applicable rule, and accordingly, respondent did not receive actual notice of the proceedings against him.

Respondent's due process rights have been denied or violated throughout the proceedings in this matter, and the respondent is entitled to have the proposed Findings of Fact, Conclusions of Law

and Recommendation of Discipline dismissed, the default vacated, and Bar Counsel ordered to effectuate adequate and proper service of the summons and complaint upon the respondent.

Additionally, the proposed sanction of disbarment is racially discriminatory and inappropriate given that the respondent was not convicted.

Dated this 19th day of May, 1992.

_____

A. Paul Schwenke

CERTIFICATE OF HAND-DELIVERY

I hereby certify that I hand-delivered a copy of the foregoing Memorandum of points and authorities in support of the Request for Reconsideration to Mr. Wendell R. Smith, Assistant Bar Counsel, 645 South 200 East, Salt Lake City, Utah this 19th day of May, 1992.

_____

A. Paul Schwenke

BEFORE THE BOARD OF BAR COMMISSIONERS
OF THE UTAH STATE BAR

In the matter of the Complaint
by RON AND CAREN SERR,

AFFIDAVIT OF A. PAUL SCHWENKE IN SUPPORT OF THE MOTION FOR RECONSIDERATION

against

A. PAUL SCHWENKE,
DOB: 10-12-51
ADM: 05-09-83

Respondent, Case No. F-322

I, A. Paul Schwenke, after first being duly sworn, deposed says as follows:

1. I am the Respondent herein.

2. I have personal knowledge of the facts stated herein.

3. In or about October, 1990, I started exploring the possibility of developing my real properties in the Nation of Western Samoa. In or about December, 1990, I discovered a potential source of investment funds from an organization called

OPIC (Overseas Private Investment Corporation) out of Washington D. C. I contacted the Samoan Embassy in Washington D.C. and the Ambassador offered to help me with my project. The Ambassador also offered his home where I stayed most of the time that I was in Washington D.C.

4. I had no affiliation with the office complex at 165 South West Temple after I moved out in November 1990, other than checking in occasionally for my mail.

5. I do not know a Norma Davies, nor was she ever authorized by me to receive my mail or be my agent for service of any type of process.

6. That I have been in and out of the State since the end of December, 1991, and I re-established a residence in Murray, Utah

on April 15, 1992.

7. That my address on the official roster of attorneys of the Bar is P.O. Box 57853, Murray, Utah 84107. I had kept said address during my absence and up until March 27, 1992.

DATED this 19th day of May, 1992.

_____

A. Paul Schwenke, Affiant

Affiant appeared personally before me and stated to me that he has personal knowledge of the facts herein stated and he know the facts are true.

SUBSCRIBED AND SWORN TO BEFORE ME this ____ day of May, 1992.

_____

Notary Public residing in
Salt Lake County

My Commission Expires:

_____

CERTIFICATE OF HAND-DELIVERY

I hereby certify that I hand-delivered, a true and exact copy of the foregoing affidavit of A. Paul Schwenke to the office of Bar Counsel at the address below, on this ____ day of May, 1992:

Office of Bar Counsel
Law and Justice Center
645 South 200 East
Salt Lake City, Utah 84111

_____

IN THE SUPREME COURT
OF THE STATE OF UTAH

In the matter of the Complaint
by KIRK HEATON,
AFFIDAVIT OF JAMIS M.
JOHNSON IN SUPPORT OF
against PETITION FOR AN
EXTRAORDINARY WRIT.
A. PAUL SCHWENKE,
DOB: 10-12-51
ADM: 05-09-83 Case No. 910095
Petitioner, Case No. F-281

vs.

Utah State Bar,

Respondent

I, Jamis M. Johnson, after first being duly sworn, deposed says as follows:

1. I am an attorney duly licensed in the State of Utah and I am familiar with, and have personal knowledge of, the facts and circumstances set forth herein.

2. Mr. A. Paul Schwenke subleased two offices from me late 1989 to November, 1990.

3. I know that, even though, Mr. Schwenke, moved out of the offices, he continued to maintain contacts with the office until he left the State sometime in January, 1991.

4. Sometime in January, 1991, Mr. A. Paul Schwenke told me of his development project in the Nation Western Samoa. He also asked me to watch for any correspondence from the Bar Office concerning two matters that were very important. One of the matters was a Kirk Heaton complaint which Mr. Schwenke asked me to file a Notice of Appeal on his behalf as soon as the Commission's recommendation is submitted to the Supreme Court.

5. I started opening Mr. A. Paul Schwenke's mails soon thereafter.

6. I had not heard from Mr. A. Paul Schwenke for about two months, so when I received a correspondence from the Bar Office for Mr. A. Paul Schwenke about the middle of March, 1991, concerning the other Bar matter that Mr. Schwenke asked me to watch for, I felt that it was important that I give the Bar Office some written notification of Mr. A. Paul Schwenke's whereabouts. That was when I submitted an affidavit on March 27, 1991, advising the Bar Office that Mr. A. Paul Schwenke was out of the country. Please see a true and exact copy said affidavit, attached hereto and incorporated herein by this referenced.

7. The office complex that my office is located is a shared office arrangement between several businesses including lawyers

and non-lawyers. All the businesses share one common receptionist provided and paid for by the landlord. Mr. A. Paul Schwenke has shown me what appears to be the mailing certificate for the Commission's Findings, Conclusions and Recommendation and the return receipt for the certified mail. The return receipt shows that a Norma Davis signed for the mail. I do not know a Norman Davis, but I do believe she had to be one of the many different temporary receptionists that fill in when the regular receptionist is absent.

8. That have not seen, until recently, a copy of the Commission's Findings, of Fact, Conclusions, and Recommendation. If I had seen the Commission's Findings of Fact, Conclusions

of Law and Recommendation in this matter, I would have timely filed a Notice of Appeal.

Dated this 7th day of May, 1992.

_____

Jamis M. Johnson, Affiant

Jamis M. Johnson, appeared personally before me this 7th day of May, 1992, and stated to me that he has personal knowledge of the facts stated herein are true.

SUBSCRIBED AND SWORN TO BEFORE ME this ____ day of May, 1992.

_____

Notary Public residing in
Salt Lake County

My Commission Expires:
12-4-94

CERTIFICATE OF HAND-DELIVERY

I hereby certify that I hand-delivered, a true and exact copy of the foregoing affidavit of Jamis M. Johnson to the following parties and at their respective addresses on this ___ day of May, 1992:

Board of Bar Commissioners
Utah State bar
645 South 200 East
Salt Lake City, Utah 84111

Office of Bar Counsel
Law and Justice Center
645 South 200 East
Salt Lake City, Utah 84111

_____
Deborah Doherty

BOARD OF BAR COMMISSIONERS
UTAH STATE BAR

CAREN SERR	:	RESPONSE TO MOTION FOR
vs.	:	RECONSIDERATION
A. PAUL SCHWENKE	:	F-322

COMES NOW the Office of Bar Counsel by and through Wendell K. Smith, Assistant Bar Counsel, and submits the following response in opposition to Respondent's Motion for Reconsideration.

1. Respondent's Motion is without merit, the matters raised in this motion regarding service of process were fully, fairly, and competently litigated before the Hearing Panel on March 2, 1992, and decided against Respondent. He has not alleged nor produced any evidence that the decision of the Hearing Panel was, arbitrary,

capricious, clearly erroneous or against the weight of the evidence. He merely seeks a de novo review before the Board of Bar Commissioners of the matters litigated before the Hearing Panel. Such a request is inappropriate and contrary to the Procedures of Discipline of the Utah State Bar and the purpose of having Hearing Panels consider cases and make recommendations to the Board.

2. Respondent's allegation that he was not properly served with the pleadings in the above-entitled action is without merit. The evidence presented to the Hearing Panel verified that all documents were sent to Respondent at his last known address as shown by the official roster of attoneys of the Bar and/or to addresses where the Bar had reasonable grounds to

believe Respondent was residing or would have received the documents. Contrary to his assertion Respondent did not keep the Bar informed of his whereabouts. The Bar exercised reasonable diligence to learn where Respondent could be reached and sent documents to those addresses where they should have been received by Respondent. The Hearing Panel found Respondent was properly served with all documents associated with the above-entitled action in accordance with Rule XI(b) of the Procedures of Discipline of the Utah State Bar. There is no evidence this finding was clearly erroneous, arbitrary, capricious, or against the weight of the evidence.

3. Respondent was afforded the opportunity by the Hearing Panel on March 2,

1992, to litigate the substance of the charges against him as set forth in the Formal Complaint even though Respondent had defaulted as to those charges. Evidence to substantiate th charges were presented by the Office of Bar Counsel. Respondent had the opportunity to examine the evidence, to confront and cross examine the witnesses against him and to present matters in his own defense.

4. Respondent's allegation that this action is racially motivated is without merit. Ron and Caren Ser retained Respondent, not Bruce J. Udall, as their counsel. The uncontrovertable facts established at the hearing on March 2, 1992, verify that Respondent, not Bruce J. Udall, stole approximately $63,000.00 from Ron and

Caren Serr. The Board can take notice of the fact that in the last three months there have been recommendations for disbarment of two white attorneys who stole considerably less than this amount from their clients. Respondent's assertion that the recommendation for his disbarment is racially motivated in light of his egregious misconduct connot possibly be made in good faith.

WHEREFORE, the Office of Bar Counsel moves that Respondent's Motion for Reconsideration be denied.

Dated this ___ day of May, 1992

Office of Bar Counsel

_____

Wendell K. Smith
Assistant Bar Counsel

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Response to Mottion for Reconsideration in the matter of Ron and Caren Serr against A. Paul Schenke, F-322, was mailed postage pre-paid to A. Paul Schwenke at 106 Magic Drive, Murray, Ut. 84107 on this ___ day of May, 1992

_____

Paul Schwenke #3951
Attorney Pro Se
106 Magic drive
Murray, Utah 84107
801-265 8530

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR.

In the Matter of the Complaint
by RON AND CAREN SERR,

against

A. PAUL SCHWENKE,
DOB: 10-12-51
ADM: 05-09-83
Respondent.

REPLY TO BAR COUNSEL'S RESPONSE TO MOTION FOR RECONSIDERATION.

Case Number F-322

Respondent, A. Paul Schwenke, respectfully submits this reply to Bar Counsel's Response to Motion for Reconsideration. Mr. Wendell K. Smith, Assistant Bar Counsel, presented four arguments in opposition to the Respondent~s Motion for Consideration. Respondent will reply below to each of Bar Counsel's

arguments. First, Mr. Wendell K. Smith asserts that the issue of service of process was fully, fairly and competently litigated before the hearing panel during the sanctions hearing on March 2, 1992. Additionally, raising this issue before the Board of Bar Commissioners (hereafter "Commissioners") is inappropriate and contrary to the Procedures of Discipline of the Utah State Bar. Answering the second point first, the respondent invites the Commissioners attention to Rule VII(f) of the Procedures of Discipline of the Utah State Bar. This rule clearly allows for; this type of motion for the Commissioners to reconsider matters that had already been considered by the hearing panel. The hearing panel is not infallible, and as shown in

this case, the hearing panel can make mistakes.

The second point raised by Bar Counsel's first argument is that the issue of service of process had been fully, fairly and competently considered by the hearing panel. Respondent agrees that he raised the issue of defective service of process at the March 2, 1992 sanctions hearing. The issue, however, was far from being fully, fairly and competently considered by the hearing panel. In fact, the hearing panel concluded that service of process may very well violate due process t it nevertheless complied with Rule XI(b) of the Procedures of Discipline of the Utah State Bar. As shown in the respondent's memorandum of points and authorities in support of this

motion for reconsideration, the hear g panel was clearly wrong in reaching said conclusion. The service of process was not made according to the requirements of Rule XI(b) and the service of process failed to meet the standard for due process as set forth in Carlson v. Bos, 740 P.2d 1269(Utah 1987).

Bar Counsel's second argument clearly mis-stated Rule XI(b) and further demonstrated ignorance of the requirements of due process as set forth in Bos, supra. Bar Counsel asserts that "[t]he evidence presented to the hearing panel verified that all documents were sent to Respondent at his last known address as shown by the official roster of attorneys and/or to adresses where the Bar had reasonable grounds to believe

respondent was residing or would have received the documnets.[1] Contrary to his assertion Respondent did not keep the Bar informed of his whereabouts." (emphasis added).

The underlined statements above are what Bar Counsel has added to the rule because Rule XI(b) does not include such requirements. To include such requirements in Rule XI(b) would clearly run counter to the mandate of Carlson v. Bos by shifting the burden to the respondent.[2] Please see

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1. It is interesting that Mr. Wendell K. Smith is now arguing "reasonable grounds to beleive Respondent . . . would have received . . " (which is not provided for under Rule XI(b)) when at the hearing he stressed that service was made at the last known address as shown on the official roster of attorneys of the Bar.

2. To accept Bar Counsel's argument here would mean that every defendant in a

the discussion of the Bos case in the respondent's memorandum of points and authorities in support of this motion for reconsideration.

Thirdly, Bar Counsel asserts that the substance of the charges in the formal complaint was litigated at the sanctions hearing of March 2, 1992 and respondent therefore had his opportunity to be heard, examined the evidence, confronted and cross-examined the witnesses and to present matters in his own defense. The March 2, 1992 hearing was to determine the proper sanctions based on the facts of the formal

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civil action will have to make sure the plaintiff who ever he or she may be, has the defendant's address for proper service of process. I doubt very much that Rule XI(b) imposes such a burden on unsuspecting defendants.

complaint which were deemed admitted on account of the respondent's allege default. The purpose of the hearing was for Bar Counsel to present evidence of aggravation while respondent presents any evidence as to mitigation Contrary to Mr. Wendell K.. Smith's assertion, the respondent just did not have his day in court and the sanctions hearing was nc substitute.

Finally, Bar Counsel asserts that respondent's claim of disparate treatment cannot be made in good faith because the incontrovertible facts established at the hearing on March 2, 1992, verify that respondent, not Bruce J. Udall, stole approximately $63,000.0o from Ron and Caren Serr. Bar Counsel further states that respondent, not Bruce J. Udall, was retained

by Ron and Caren Serr. Bar Counsel's statement is defamatory and blatantly false. No evidence has ever been adduced, at the March 2, 1992 hearing or at any other time, that respondent stole $63,000.00 from Ron and Caren Serr. In fact, all of the evidence available, bearing on the issue of theft, were properly presented to a jury which unanimously found that the respondent did not commit any theft. Mr. Wendell K. Smith's statement is not only defamatory, it is clearly calculated to inflame the emotion of the Commissioners.[3]

Additionally, Mr. Wendell K. Smith misrepresented the fact of Mr. Bruce Udall's

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3. Mr. Wendell K. Smith's charge that the Respondent stole $63,000.00 is without any factual basis. Clearly, unsupported charges further support Respondent's claim of disparate treatment.

relationship to Ron and Caren Serr. Mr. Wendell K. Smith stated that iron and Caren Serr retained Respondent, not Bruce J. Udall, as their counsel". In Bar Counsel's formal complaint against Mr. Bruce J. Udall, Bar Counsel charged that Bruce J. Udall was a partner in the law firm of Schwenke and Udall.[4] That Mr. Bruce J. Udall negotiated the fee agreement to for the partnership to represent Caren Serr.[5] That Mr. Bruce J. Udall was directly involved in the financial affairs of the purported partnership, having direct knowledge of what monies were received, the monies origin, use and

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4. Formal Complaint, F-382, Part III, paragraph 2.

5. Formal Complaint, F-382, part III, paragraphs 4 and 5.

disbursement.[6]

Respondent challenges the Commissioners to conduct a close examination of the facts of the relationship of Mr. Bruce J. Udall and respondent and their relationship to Ron and Caren Serr. The respondent is confident that the Commissioners will find no difference between Mr. Bruce J. Udall's actions and the respondent actions vis a vis Ron and Caren Serr. But why is there a difference in the sanctions sought. Since the respondent is not white anglo saxon, it is not hard for the respondent to conclude that his color may be the difference.

Respondent prays that the Commissioners

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6. Formal Complaint, F-382, part III, paragraph 3. Mr. Bruce UdJ. Udall handled the partnership's check book.

will take corrective actions in this matter, vacate and set aside the Findings of Fact, Conclusions of Law and Recommendation, vacate and set aside the respondent's default and order Bar Counsel to effect proper and lawful service of the summons and complaint herein.

Dated this _ day of May, 1992.

_____

A. Paul Schwenke

CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand-delivered a copy of the foregoing request for reconsideration to Mr. Wendell K. Smith, Assistant Bar Counsel, 645 South 200 East, Salt Lake City, Utah this __ day of May, 1992.

_____

IN THE UTAH STATE BAR
OF THE UTAH STATE BAR
Hearing Panel:
Robert Wallace
E. Gregg Tobler
Sandra Wilkins

In The Matter of the Complaint
by

RON AND CAREN SERR

FINDINGS AND ORDER GRANTING RESPONDENT'S MOTION FOR RECONSIDERATION

against

F-322

A. PAUL SCHWENKE
DOB: 10-12-51
ADM: 05-09-83

This matter came on for Hearing on May 28, 1992 before the Board of Bar Commissioners of the Utah State Bar ("the Board") on Respondent's Motion for Reconsideration of the Board's approval of the Findings of Fact, Conclusions of Law and Recommendation of Discipline submitted by the Hearing Panel. The Office of Bar Counsel

was represented by Wendell K. Smith, Assistant Bar Counsel and the Respondent appeared Pro SE.

Respondent informed the Board that the last address at which he practiced law in Utah was 165 South West Temple, Suite 300, Salt Lake City, Utah 84111, and that when the Summons and Formal Complaint were sent to that address on December 4, 1990, he was still residing in Utah. However, Respondent denies that he received these documents or notice of these documents.

Bar Counsel who was also present at the Hearing informed the Board that persons from his office had investigated and determined that Respondent was no longer at the address shown on the official roster of attorneys of the Bar and, therefore, sent the Summons,

Formal Complaint, Notice of Intent to Default, and Default to his last known actual address. Bar Counsel also informed the Board that an attorney whose office was at that location had agreed to forward all documents to Respondent mailed to that address.

Respondent informed the Board that correspondence, pleadings and any other documents in connection with this matter could be sent to him at either of the following addresses:

106 Magic Drive
Murray, Utah 84107
121 East 5460 South, Apt. 35
Murray, Utah 84107

Respondent further represented to the Board that he did not learn of the Sanctions Hearing scheduled for March 2, 1992, until

he arrived in Salt Lake City on another matter. Assistant Bar Counsel advised the Board the Respondent told the Hearing Panel that he learned of the Hearing from someone residing at the address in Las Vegas, Nevada to which the Notice of Hearing was mailed. Nevertheless, he stated that he did not have sufficient notice to adequately prepare for the Hearing.

Respondent advised the Board that he had received a copy of the Formal Complaint issued in the above-entitled action.

The Board having heard the arguments of Counsel, and being otherwise fully advised in the premises, hereby makes its Findings as follows:

FINDINGS

1. On or about December 4, 1990, the

Summons and Formal Complaint issued in the above-entitled action were served on Respondent by sending them by certified mail to the last known address where Respondent was practicing law which was 165 South West Temple, Suite 300, Salt Lake City, Utah 84111. The Summons and Formal Complaint were not returned to the sender.

2. Respondent did not file his Answer to the Formal Complaint and on January 11,. 1991 Notice of Intent to Default was sent to Respondent by certified mail to the above-noted address. The Notice of Intent to Default was not returned to the sender.

3. Default was entered against Respondent in the above entitled action on March 19, 1991, and served upon Respondent by sending a copy by certified mail to the

above-noted address. The Default was not returned to the sender.

4. On December 6, 1991, Notice of Hearing was sent to Respondent by certified mail to P.O. Box 57853, Murray, Utah 84107 and 5233 Holbrook Drive, Las Vegas, Nevada 89103. Neither Notice of Hearing was returned to sender. The Notice of Hearing informed Respondent that a Sanctions Hearing would be held on March 2, 1992, at 9:00 a.m. at the office of the Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111.

5. Respondent appeared at the Sanctions Hearing and indicated that he had learned of the Hearing due to the Notice sent to the address in Las Vegas. Caren Serr and Samuel King were called as witnesses and presented testimony on the merits of the complaint

against Respondent. Respondent also presented matters in his own defense and in extenuation and mitigation.

6. The Hearing Panel found Respondent had been properly served with the pleadings in this action and upon consideration of the case recommended that Respondent be disbarred.

7. On May 20, 1992, Respondent filed a Motion for Reconsideration with the Board of Bar Commissioners the substance of which alleged that he had received no actual notice of the Formal Complaint filed in this action and that default could not be entered against him since the Formal Complaint, Notice of Intent to Default, and Default had been sent to his last known address as an attorney in Salt Lake City, Utah rather

than his last known address as shown by the official roster of attorneys of the Bar.

CONCLUSIONS

Based upon the foregoing findings, the Board concluded that, in the interest of fairness, Respondent should be allowed to present the merits of his position to the Hearing Panel and that his Motion for Reconsideration should be granted.

ORDER

Based upon the foregoing findings and conclusions, it is hereby ORDERED that Respondent's Motion for Reconsideration be and the same hereby is granted; and it is further ORDERED that Respondent file his Answer to the Formal Complaint in the above-entitled action and serve a copy thereof on the Office of Bar Counsel within

ten (10) days the date of this Order.

DATED this 8th day of June, 1992.

BAR COMMISSIONERS

_____

James Z. Davis
President

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Order was mailed certified mail, return receipt requested, postal certificate number P805 583 724 to A. Paul Schwenke at 106 Magic Drive, Murray, Utah 84107, 121 East 5460 South, Apt. 35, Murray Utah 84107, and P.O. Box 7853, Murray, Utah 84107, this 16th day of June, 1992.

_____

BEFORE THE BOARD OF BAR COMMISSIONERS
OF THE UTAH STATE BAR

In the matter of the Complaint by,	OBJECTION TO THE FINDINGS AND ORDER
GRANTING CAREN SERR	RESPONDENT'S MOTION FOR RECONSIDERATION.
against	
A. PAUL SCHWENKE DOB: 10-12-51 ADM: 05-09-83	F-322

Respondent respectfully objects to the Findings and Order Granting Respondent's Motion for Reconsideration on the following grounds:

1. The Findings and Order as prepared by Bar Counsel does not accurately reflect the facts before the Board, the legal basis for the Motion and the remedies sought by Respondent.

2. The respondent's Motion for Reconsideration was based on two grounds.

(1) The service of the Summons and Complaint was defective under the constitutional standard articulated in Mullane v. Central Hanover Bank, 339 U.S. 306, 314; 70 S. Ct. 652, 657; 94 L.Ed.865 (1950), Carlson v. Bos, 740 P.2d 1269, 1275 (Utah 1987) and the proceedings pursuant to a defective service of process was violative of respondent's rights to due process under the Constitution of the State of Utah and the Constitution of the United States of America. (2) The sanctions imposed was racially discriminatory.

3. The respondent sought to have the Recommendation of Discipline dismissed, the default vacated, and Bar Counsel to effectuate constitutionally proper service of the Summons and Complaint.

4. The granting of the respondent's Motion could not have been founded of the second ground of racial discrimination because it was addressed only to the appropriateness and fairness of the recommended sanctions.

5. The granting of the respondent's Motion must have been based solely on the fact that the service of process was defective. If the service of process was defective in December 4, 1990, it could not all of a sudden be clothed with validity in June 1992 without Bar Counsel curing the reason for the defect.

6. The only logical Order when the respondent's Motion was granted because the service of process was defective is an Order granting the remedy sought in the Motion as

set forth above in paragraph #3.

For the foregoing reasons the respondent respectfully requests that the honorable Board of Bar Commissioners rescind the Findings and Order Granting Respondent's Motion for Reconsideration and to enter an Order that is consistent with the facts, the legal arguments and the remedies as expressly set forth in the respondent's moving papers.

Dated this 29 day of June, 1992.

_____

A. Paul Schwenke
Respondent.

CERTIFICATE OF HAND-DELIVERY.

I hereby certify that I hand-delivered, a true and exact copy of the foregoing Objection to the following this 29 day of June 1992:

Office of Bar Counsel
Law and Justice Center
645 South 200 East
Salt Lake City, Utah 84111

_____
A. Paul Schwenke

A. Paul Schwenke #3951
Respondent
106 W. Magic Dr.
Murray, Utah 84107
Telephone: 8011 269-9029

BEFORE THE BOARD OF BAR COMMISSIONERS
OF THE UTAH STATE BAR.

In the matter of the
Complaint by,

MOTION TO QUASH

CAREN SERR,

against

F-322
A. PAUL SCHWENKE
DOB: 10-12-51

Respondent appears specially and respectfully moves the Board of Bar Commissioners by and through the Hearing Panel to quash the Summons and Complaint allegedly served on respondent. This Motion is based on the following grounds.

1. The Board of Bar Commissioner's granted petitioner's Motion for Reconsideration of the Hearing Panel's Recommendation of Discipline against the Respondent on the ground that the service of the Summons and Complaint was defective under the standard promulgated in Mullane v. Central Hanover Bank, 339 U.S. 306, 314; 70 S.Ct. 652, 657; 94 L.Ed. 865 (1950) and Carlson v. Bos, 740 P.2d 1269, 1275 (Utah 1987).

2. The Summons and Complaint have not been served pursuant to Rule VIII of the Rules of discipline of the Utah State Bar nor was the Summons and Complaint served pursuant to Rule 4 of the Utah Rules of Civil Procedures and accordingly this proceeding violates the respondent~s due process rights under the Constitution of the State of Utah and the Constitution of the United States of America.

3. The respondent has substantive rights conferred by the rules of discipline, limitation of action provision, and under the generally applicable limitation of action statutes. Without a time certain wherein the respondent has been served, respondent is arguably denied his rights to assert the applicable statute of limitation

as a defense.

For the foregoing reasons and any other arguments in supplemental thereto, the respondent respectfully requests the Hearing Panel to quash the service of the Summons and Complaint and dismiss this matter.

Dated this 29 day of June, 1992.

_____

A. Paul Schwenke
Respondent.

CERTIFICATE OF HAND-DELIVERY.

I hereby certify that I hand-delivered, a true and exact copy of the foregoing Objection to the following:
Office of Bar Counsel
Law and Justice Center
645 South 200 East
Salt Lake City, Utah 84111
this 29 day of June, 1992.

_____

A. Paul Schwenke

Wendell K. Smith, #3019
Assistant Bar Counsel
OFFICE OF BAR COUNSEL
645 S. 200 E.
Salt Lake City, Utah 84111
801-531-9110

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In the Matter of
the Complaint by

CAREN SERR

SUMMONS

against

F-322

A. PAUL SCHWENKE
DOB: 10-12-51
ADM: 05-09-83

THE UTAH STATE BAR TO:
A. Paul Schwenke
106 Magic Drive
Murray, Utah

You are hereby cited to appear and file an Answer in writing within twenty days after service of this Summons upon you, asserting your defense to the Complaint in the above entitled action, a copy of which

is attached and served herewith. If the service of the Summons and attached Complaint is by mail, you actually have twenty-three (23) days from the date of the mailing of the Summons and Complaint to have your Answer postmarked or personally filed with John C. Baldwin at the Bar Office.

If you fail to answer within the time fixed by this Summons, the Commission will enter your default, deem the allegations admitted, and proceed to fix the time and date for a hearing to receive evidence and argument with respect to the discipline, if any, to be imposed or recommended.

DATED this _____day of July, 1992.

Wendell K. Smith Assistant Bar Counsel	Dale Kimball, Chair Ethics and discipline Committee

Sllvan D. Warnick
Salt Lake CountyConstable

STATE of UTAH
ss AFFIDAVIT OF SERVICE
COUNTY OF SALT LAKE

I, Douglas Magbey being first duly sworn upon oath, depose and say: That I am a resident of the State of Utah and a citizen of the United States over the age of 18 years at the time of service herein, and not a party to or interested in the within action. That on the 7 day of July, 1992, I received a copy of the annexed:

SUMMONS & COMPLAINT

and delivered a true and copy of the same to Defendant personally, on the 7 day of July, 1992, 10:05 p.m. at 106 Magic Drive.
I further certify that at the time of such service of the above said article(s) I

endorsed the date and added my name therto.

Subscribed and sworn to before me this

7 day of July, 1992.

Douglas Magbey

ALANNA WARNICK
NOTARY REPUBLIC
STATE OF UTAH
My Commission expires
November 19, 1994

Mileage Fee	$9.00
Service Fee	$6.00
Tendered Fee	
Total	$15.00

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In The Matter of the Complaint by
CAREN SERR DEFAULT
gainst F-322
A. PAUL SCHWENKE
DOB: 12-12-51
ADM: 05-09-83

The Respondent having been regularly served with process, and having failed to appear and answer the Formal Complaint on file in the above-captioned matter, and the time allowed by the Procedures of Discipline of the Utah State Bar and the Summons for answering having expired, the default of the Respondent is hereby entered, upon the request of the Office of Bar Counsel.

DATED this 19 day of March, 1991.

_____

JOHN C. BALDWIN
Executive Director

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Default was mailed certified mail, postal certification number P753 115 861 to A. Paul Schwenke at 165 S. West Temple, Suite 300, SLC, UT 84101 on this 19th day of March, 1991.

_____

BEFORE THE BOARD OF BAR COMMISSIONERS
OF THE UTAH STATE BAR

In the matter of theComplaint by,
ANSWER

CAREN SERR,
against F-322

A. PAUL SCHWENKE
DOB: 10-12-51
ADM: 05-09-83 JURY DEMAND

Respondent answers and alleges as follows:

FIRST DEFENSE

The Summons and Complaint and the claims alleged therein are barred by the applicable statute of limitations.

SECOND DEFENSE

The Summons and Complaint and the charges alleged therein are barred by the doctrine of laches.

THIRD DEFENSE

The Summons and Complaint and the

allegations and issues raised therein are barred by the doctrine of collateral estoppel.

FOURTH DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

FIFTH DEFENSE

Respondent answers each of the allegations of the Complaint as follows:

1. Respondent admits allegations of Part I of the complaint.

2. Respondent is without sufficient information to admit or deny allegations of paragraphs 1 through 3 of Part II of the Complaint and for this reason denies the same.

3. Respondent denies allegations of

Part III of the Complaint.

4. Respondent admits allegations of paragraph 5, Part IV.

5. Respondent denies allegations of paragraphs 6 through 30, Part IV of the Complaint.

Wherefore, Respondent prays for dismissal of this matter, no cause of action, and for an award of his costs in defending this action.

Dated this 5 day of August, 1992.

_____

A. Paul Schwenke
Respondent.

CERTIFICATE OF HAND-DELIVERY

I hereby certify that I hand-delivered a true and exact copy of the foregoing answer to Wendell K. Smith, Assistant Bar Counsel 645 South 200 East, Salt Lake City, Utah 84111, this 5 day of August, 1992,

_____

A. Paul Schwenke

BEFORE THE BOARD OF BAR COMMISSIONERS
OF THE UTAH STATE BAR

In the matter of the Complaint
by CAREN SERR,
RESPONDENT'S

against
OBJECTIONS TO THE FINDINGS AND ORDER
A. PAUL SCHWENKE,
DOB: 10-12-51
ADM: 05-09-83

ORDER DENYING MOTION TO QUASH AND OVERRULING HIS OF THE BOARD OF BAR COMMISSIONERS

Case No. F-322

The Board of Bar Commissioners having considered Respondent's Motion to Quash the Summons issued in the above-entitled action, his objections to the Findings and Order of the Board granting his Motion for Reconsideration, and the Office of Bar Counsel's Response in Opposition thereto with attached exhibit, and being fully advised in the premises, it is hereby

ORDERED that Respondent's Motion to

Quash be, and the same is hereby denied, having been rendered moot by his personal service on July 7, 1992. It is further

ORDERED, that Respondent's Objection to the Board's Findings and Order Granting his Motion for Reconsideration be, and it is hereby, denied and overruled. Respondent may raise those issues contained in his objection before the Hearing Panel when it reconvenes to rehear his case.

DATED this 10th day of August, 1992.

BOARD OF BAR COMMISSIONERS

By: _____
Randy L. Dryer, President

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Order Denying Respondent's Motion to Quash and Overruling His Objections to the Findings and Order of the Board of Bar Commissioners to A. Paul Schwenke, at 106 Magic Dr., Murray, Utah 84107, on this 12th day of August, 1992.

_____

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In The Matter of the Complaint by	MOTION TO AFFIRM FINDINGS
CONCLUSIONS AND CAREN SERR	RECOMMENDATIONS OF HEARING PANEL
against	
A. PAUL SCHWENKE DOB: 10-12-51 ADM: 05-09-83	F-322

COMES NOW the Office of Bar Counsel by and through Wendell K. Smith, Assistant Bar Counsel, and pursuant to the provisions of Rule XII(e) of the Procedures of Discipline of the Utah State Bar, moves the Board of Bar Commissioners for an Order affirming the Findings of fact, Conclusions of Law, and Recommendation of Discipline of the Hearing Panel entered in the above-entitled action on April 20, 1992. The grounds for this

Motion are more fully set forth in the Memorandum of Points and Authorities attached hereto and incorporated herein.

DATED this 10 day of August, 1992.

OFFICE OF BAR COUNSEL

_____

Wendell K. Smith
Assistant Bar Counsel

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and Correct copy of the foregoing Motion to Affirm Findings, Conclusions and Recommendations of Hearing Panel by certified mail, postal certification number P 805 583 708, to A. Paul Schwenke, at 106 Magic Dr., Murray, UT 84107, on this 10 DAY OF August, 1992.

Wendell K. Smith, #3019
Assistant Bar Counsel
Office of Bar Counsel
645 South 200 East
Salt Lake City, UT 84111-3834
(801) 531-9110

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In The Matter of the
Complaint by) MEMORANDUM OF POI
) AUTHORITIES IN SU

	) OF
CAREN SERR	) MOTION TO AFFIRM
	) FINDINGS,
	) CONCLUSIONS, AND
against	) RECONMENDATIONS (
HEARING PANEL	
A. PAUL SCHWENRE	
DOB: 10-12-51	) F-322
ADM: 05-09-83	

COMES NOW, the Office of Bar Counsel by and through Wendell R. Smith, Assistant Bar Counsel, and submits the following Memorandum of Points and Authorities in support of Motion to Affirm the Findings of Fact, Conclusions of Law, and Recommendations of Discipline entered by the Hearing Panel in the above-entitled action on April 20, 1992.

STATEMENT OF THE CASE

1. On or about December 4, 1990, the Office of Bar Counsel served Respondent with a Summons and Formal Complaint in this

action by ~ending a copy thereof by certified mail to 165 South West Temple, Suite 300, Salt Lake City, Utah 84101, which was the last known address where Respondent was practicing law. The Summons and Complaint were sent to this address after an investigation was conducted by the Office of Bar Counsel which led to the determination that Respondent would not, in fact, receive any mail that was set to him at his last address as shown on the roster of attorneys of the Bar. A copy of this Summons and Formal Complaint is attached hereto as Exhibit 1, and incorporated herein.

2. Prior to serving Respondent by mail Bar Counsel, Stephen A. Trost, spoke with Jamis M. Johnson, Respondent's

associate, who stated that he would forward to Respondent all correspondence addressed to Respondent which was received at his office at 165 South West Temple, Salt Lake City, Utah. In reliance upon that representation of Mr. Johnson, and the investigation done by the Office of Bar Counsel, the Summons and Formal Complaint were sent by certified mail to Respondent at Mr. Johnson's office. The documents were received at that address and were not returned by the post office. The Affidavit of Stephen A. Trost is attached hereto as Exhibit 2, and incorporated herein.

3. On March 28, 1991, Default was entered against Respondent for his failure to file an Answer or other responsive pleading to the Summons and Formal

Complaint. A copy of this Default is attached hereto as Exhibit 3, and incorporated herein.

4. On or about December 6, 1991 a Notice of Hearing were sent to Respondent by Certified Mail to P.O. Box 57853, Murray, UT 84107 and 5233 Holbrook Drive, Las Vegas, NV 89103. The prior address was provided to the Bar by Respondent the latter addresses was provided by Mr. Jamis Johnson as being the current addresses where Respondent could be located. These Notices informed Respondent of a Sanctions Hearing to be held on March 2, 1992, at 9:00 a.m. at the Law and Justice Center, 645 South 200 East,Salt Lake City, UT. A copy of this Notice is attached hereto as Exhibit 4, and incorporated herein.

5. Respondent appeared at the Sanctions Hearing. Notwithstanding that the case was in default, the Office of Bar Counsel put on evidence regarding Respondent's violations of the Rules of Professional Conduct. Complainant Caren Serr and Samuel Ring were called as witnesses and testified about the substance of the matters set forth in the Formal Complaint. Respondent crossexamined the witnesses, examined the documents offered by the witnesses, and put on matters in his own defense. The Hearing Panel, having considered the evidence, including Respondent's defense to the charges, recommended that Respondent be disbarred. A copy of the Findings of Fact, Conclusions of Law and Recommendation of Discipline of the Hearing Panel is attached hereto as

Exhibit 5, and incorporated herein.

6. On May 4, 1992, the Board of Bar Commissioners signed an Order affirming the Findings, Conclusions and Recommendations of the Hearing Panel. A copy of this Order is attached hereto as Exhibit 6, and incorporated herein.

7. On May 19, 1992, Respondent filed a Motion for Reconsideration with the Board of Bar Commissioners asking them to reconsider their Order of May 4, 1992. The substance of his Motion was that he had not been served with the Summons and Formal Complaint in the above-entitled action. A copy of his Motion is attached hereto as Exhibit 7. The Office of Bar Counsel's Response to Motion for Reconsideration is attached hereto as Exhibit 8, and incorporated herein.

8. On May 28, 1992, the Board of Bar Commissioners granted Respondent's Motion for Reconsideration. On that date Respondent appeared before the Board, provided them with his current address, alleged that he had not been served with the Summons and Formal Complaint in this action, and admitted to the Board he was then in possession of a copy of the Summons and Formal Complaint filed in F-322. Based upon Respondent's admission before the Board that he had received a copy of the Formal Complaint the Board ordered him to file his Answer thereto within 10 days. The Board's Order which was signed on June 8, 1992, is attached hereto as Exhibit 9, and incorporated herein.

8. On or about June 29, 1992, in lieu

of an Answer, Respondent filed an Objection to the Findings and Order of the Board of Bar Commissioners and a Motion to Quash the Summons. He again alleged that the Summons was invalid because he had not been properly served. A copy of Respondent's Motion to Quash is attached hereto as Exhibit Q.

9. On July 7, 1992, Respondent was personally served with a Summons and Formal Complaint in the above entitled action. A copy of the Affidavit of Service by Constable Silvan D. War nick, is attached hereto as Exhibit 11, and incorporated herein. The Affidavit of Constable Warnick verifies that Respondent was personally served in the aboveentitled action on July 7, 1992, at 10:05 p.m. at 106 Magic Drive, Murray, Utah. Respondent did not file an

Answer in response to this personal service of a Summons and Formal Complaint within the time set forth in the Summons.

10. On July 31, 1991, Default was entered against Respondent. A copy of the Default is attached hereto as Exhibit 12, and incorporated herein. Respondent has again defaulted in this action by failing to file an Answer even though personally served with the Summons and Complaint.

11. The Hearing Panel appointed in this case has already heard and considered the evidence and the matters submitted by Respondent in his own defense, as well as in extenuation and mitigation.

CONCLUSION

12. Respondent has forfeited his right to present further matters to the Hearing

Panel. Therefore, the Office of Bar Counsel moves the Board of Bar Commissioners for an Order Affirming the Findings of Fact, Conclusions of Law, and Recommendation of Discipline entered by the Hearing Panel following the Sanctions Hearing held in this matter on March 2, 1992.

DATED this 10th day of August, 1992.

OFFICE OF BAR COUNSEL

By: Wendell K. Smith
Assistant Bar Counsel

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum of Points and Authorities in Support of Motion to Affirm Findings, Conclusions and Recommendations of Hearing Panel by certified mail, postal certification number , to A. Paul Schwenke, at 106 Magic Dr.,

Murray, UT 84107, on this 10th day of August, 1992.

THIS MEMORANDUM HAD 12 EXHIBITS, ONLY EXHIBIT #2 IS INCLUDED HEREIN BELOW. THE OTHR 11 EXHIBITS ARE IRRELEVANT AND WERE INCLUDED BY BAR COUNSEL TO HIDE THE ILLEGAL EXHIBIT #2.

Stephen A. Trost, #3286
Bar Counsel
OFFICE OF BAR COUNSEL
645 South 200 East
Salt Lake City, Utah 84111
(801) 531-9110

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In the Matter of the
Complaint by

CAREN SERR

AFFIDAVIT OF
STEPHEN A. TROST

against

A. PAUL SCHWENKE
DOB: 10-12-51
ADM: 05-09-83

STATE OF UTAH
ss .
COUNTY OF SALT LAKE

The affiant, Stephen A. Trost, being first duly sworn deposes and states:

1. I was appointed Bar Counsel for the Utah State Bar on February 1, 1990.

2. In the course of my duties as Bar

Counsel certain disciplinary cases were being prosecuted by the Office of Bar Counsel under my direction.

3. Due to the severity of the charges against Mr. Schwenke and his lack of response, I personally visited in or about December of 1990 the law office of Jamis Johnson located at 165 South West Temple, Suite 300, Salt Lake City, Utah where Mr. Schwenke office shared. See Exhibit A 1991 Capitol Reporters Legal Directory; Exhibit B a letter from Judge M. Murphy with enclosure; Exhibit C withdrawal of Counsel - all indicating 165 S. West Temple as the correct office address.

4. I spoke with Mr. Johnson regarding the pending disciplinary case and he informed me that if I used the 165 S. West

Temple address to mail pleadings and other correspondence he would see to it that Mr. Schwenke would receive the same.

5. Mr. Johnson confirmed that Mr. Schwenke was no longer residing in the State of Utah but that he did have a telephone number for Mr. Schwenke in Las Vegas where his exwife resided and that he had been successful in contacting Mr. Schwenke at that address and telephone number although he did not disclose these to me.

FURTHER AFFIANT SAYETH NOT.

DATED this 16th day of October, 1992.

Stephen A. Trost
Bar Counsel

Subsrcibed and sworn before me this 16th day of October, 1992.

NOTARY PUBLIC, Residing in Salt Lake County

BEFORE THE BOARD OF BAR COMMISSIONERS
THE UTAH STATE BAR

In the matter of the
Complaint by,

CAREN SERR,

against

A. PAUL SCHWENKE
DOB: 10-12-51
ADM: 05-09-83

MOTION TO SET ASIDE DEFAULT CERTIFICATE

F-322

JURY DEMAND

Respondent, A. Paul Schwenke, respectfully moves the Board of Bar Commissioners to set aside the default certificate entered in this matter on the ground that respondent inadvertently placed the answer back in his files rather than in the envelope delivered to the Bar Office.

Respondent was served with the summons and complaint in the above matter on July 7, 1992. On July 15, 1992, Respondent had an

answer ready to be filed with the Bar Office. Respondent took his answer and a memorandum of law and other documents on another unrelated matter to make copies for Bar Counsel. After making the copies, Respondent thought he placed all of the copies and the original of the answer for the Bar Office in a large envelope for delivery to the Bar Office. The envelope was delivered to the Bar Office on or about July 17, 1992. Unbeknownst to Respondent, he inadvertently placed the original of his answer and the copy intended to be filed with the Bar Office back in the file instead of the envelope for the Bar Office. Respondent did not discover his mistake until August 4, 1992 when he received a Request for Default in the mail. Upon

discovering the mistake, Respondent immediately filed the original and copy of the answer. Bar Counsel can attest that Respondent has been very diligent in responding to Bar matters in the last several months. That but for the mistake and inadvertence, the answer to the above captioned matter would have been timely filed.

Dated this 11 day of August, 1992.

_____

A. Paul Schwenke
Respondent.

CERTIFICATE OF HAND-DELIVERY

I hereby certify that I hand-delivered a true and exact copy of the foregoing Motion to Set Aside to Wendell K. Smith, Assistant Bar Counsel 645 South 200 East, Salt Lake City, Utah 84111, this 11 day of August, 1992.

_____

A. Paul Schwenke

ORIGINAL

A. Paul Schwenke #3951
Attorney Pro Se
75 East 400 South #300
Salt Lake City, Utah 84101
Telephone: 801 530-0100

FI L E D

October, 2 1992

IN THE UTAH SUPREME COURT UTAH

In the Matter of the Complaint

by CAREN SERR,

NOTICE OF APPEAL

against

A. PAUL SCHWENKE,
DOB:10-12-51
ADM: 05-09-83
Petitioner,

Case No. 92048

Case Number below
F-322

vs.

Utah State Bar,

Respondent.

A. Paul Schwenke, Petitioner, appearing Pro Se, pursuant to Rule XIV, Procedures of Discipline of the Utah State Bar, respectfully appeals to the Supreme Court the Order Affirming Findings of Fact

Conclusions of Law and Recommendation of Discipline entered by the Board of Bar Commissioners on September 3rd, 1992.

BASIS FOR THE APPEAL

Petitioner timely prepared his Answer to the Formal Complaint in this matter, but he inadvertently, placed the original and a copy of the Answer back in his file rather than in the envelope that Petitioner delivered to the Office of Bar Counsel on July 17, 1992. After discovering his mistake, Petitioner immediately filed his answer on August 5, 1992, although the filing was 9 days late.

Assistant Bar counsel, Mr. Wendell Smith, refused to stipulate to set aside the default certificate. Petitioner, immediately filed his motion to set aside

the default. Assistant Bar Counsel filed his motion to affirm the Findings, Conclusions and Recommendations. The Board of Bar Commissioners by its president, Randy L. Dryer, signed the order Affirming Findings, Conclusions, and Recommendation on September 3, 1992, in effect, granting Assistant Bar Counsel's motion but ignoring petitioner's motion.

Once again the Office of Bar Counsel has managed to impose discipline against petitioner without proving one iota of its frivolous charges. The court please be reminded that petitioner is under a one year suspension as result of a default. The default in the instant case is even more outrageous because if it is allowed to stand, Assistant Bar Counsel would have

successfully circumvented the statute of limitation. The four year statute of limitation ran in September, 1990.

I pray the court will clearly see the injustice perpetrated against the petitioner and reverse the order of the Board of Bar Commissioners.

PROCEDURAL FACTS.

1. On March 28, 1991, default for failure to answer the formal complaint was entered against the petitioner while he was out of the country.

2. Pursuant to said default a disciplinary hearing was held on March 2, 1992 at the Law and Justice Center. Petitioner was present at the hearing.

3. On May 4, 1992, the Board of Bar Commissioners signed an

Order affirming the Findings, Conclusions and Recommendations of the Hearing Panel.

4. On May 19, 1992, petitioner filed a Motion for Reconsideration of the May 4, 1992 order. Petitioner sought the following remedy: "to have the proposed Findings of Fact, Conclusions of Law and Recommendation of Discipline dismissed, the default vacated, and Bar Counsel ordered to effectuate adequate and proper service of the summons and complaint upon the respondent". Petitioner's motion was granted.

5. On June 8, 1992, The Board of Bar Commissioner's signed an order prepared by Bar Counsel granting petitioner's motion for reconsideration. The order clearly failed to accurately reflect the sum and substance

of petitioner's motion which had been granted.

6. On June 29, 1992, petitioner filed his objection to the order that had been signed on the ground that the order failed to properly reflect the merits of the matter before the Board of Bar Commissioner. Since the order erroneously required the petitioner to file an answer, petition also filed a motion to quash the Summons.

7. On July 7, 1992, petitioner was personally served with the Summons and Formal Complaint in this matter.

8. On August 10, 1992, the Board of Bar Cqmmissioners denied petitioners objection to the order granting petitioner's motion to reconsider on the ground that petitioner's objection was moot by the

personal service of the Summons and Formal Complaint upon petitioner on July 7, 1992.

9. On July 9, 1992, petitioner appeared before the special master by order of the supreme court on two charges of contempt against petitioner. After the hearing, the special master requested a memorandum of law from petitioner and a reply memorandum from Bar Counsel.

10. Beginning on July 14, 1992 through July 17, 1992, petitioner prepared the memorandum of law for the special master, the Notice of Suspension, the Notice of Compliance with Rule XVIII and the Answer to the Formal Complaint in this matter.

11. On July 17, 1992 petitioner took the final drafts of the Memorandum of Lair, the Notice of Suspension, the Notice of

Compliance with Rule XVIII and the Answer to the Formal Complaint for copying. After copying, petitioner thought pe placed a copy of the Memorandum of Law, the Notice of Suspension, the Notice of Compliance with Rule XVIII and the original !and a copy of the Answer in a large envelope with he delivered to the Law and Justice Center the same day. Unfortunately, petitioner was mistaken because he inadvertently put the original and copy of the Answer back in his file.;

12. On August 5, 1992, after receiving a copy of Bar counsel's Request to enter Default, petitioner checked his file and discovered his mistake.

13. After a futile effort to convince Assistant Bar Counsel, Wendell Smith to

stipulate to set aside the default, petitioner filed his motion to set aside the default on August 11, 1992.

14. The Board of Bar Commissioners have not acted on petitioner's motion to set aside the default, but it has already entered its order affirming Findings, Conclusion and Recommendation.

GROUNDS FOR REVERSAL

1. The default is a bad faith action by Bar Counsel to circumvent the statute of limitation which clearly bars this action.

2. Technically, the time for petitioner to answer should not have accrued until after the date of the denial by the Board of Bar Commissioners of petitioner's objection to the order granting petitioner's motion for reconsideration.

3. Technically, the order affirming Findings, Conclusions and Recommendation is premature because the Board of Bar Commissioners still has pending before it petitioner's motion to set aside the default certificate.

Dated this 1st day of October, 1992.

A. Paul Schwenke

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage pre-paid, a copies of the foregoing Notice of Appeal to Mr. Wendell K. Smith, Assistant Bar Counsel, and to the Executive Director, both at 645 South 200 East, Salt Lake City, Utah 84111, and to Honorable Geoffrey J. Butler, Clerk of the Supreme Court, at 332 State Capitol, Salt Lake City, Utah 84114, this 1st day of October, 1992.

A. Paul Schwenke #3951
Attorney Pro Se
75 East 400 South #300
Salt Lake City, Utah 84101

IN THE UTAH SUPREME COURT
DOCKETING STATEMENT

In the Matter of the Complaint
by CAREN SERR,

DOCKETING STATEMENT

against

A. PAUL SCHWENKE, No. 920480
DOB: 10-12-51
ADM: 05-09-83 Case Number below

Petitioner, F-322

vs.

Utah State Bar,

Respondent.

A. Paul Schwenke, Petitioner, appearing Pro Se, respectfully submits his Docketing Statement pursuant to Rule 9, Utah Rules of Appellate Procedure.

I. STATEMENT OF REQUIRED DATES.

1. Date of Order sought to be reviewed: September 3, 1992, and served by mail on September 9, 1992 or September 12, 1992 after adding three days for service by mail.

2. Date of the Notice of Appeal: The Notice of Appeal was filed by mail on October 1, 1992 with the erroneous filing fee of $100.00. The balance of $60.00 was paid on October 20, 1992 after petitioner was informed of the new fee schedule. The fee receipt showed October 21, 1992.

II. STATEMENT OF THE SPECIFIC RULE OR STATUTE CONFERRING JURISDICTION.

Appellate jurisdiction is proper pursuant to the following authorities: Rule XIV(a), Procedure of Discipline of the Utah State Bar.

2. Constitution of Utah, Art. VIII, 4.

III. A CONCISE STATEMENT OF THE NATURE OF THE PROCEEDING

This petition is to review the propriety of the procedure leading to the Order Affirming Findings of Law and Recommendation of Discipline of the Board of Bar Commissioners and to further review the propriety of proceeding against petitioner on a claim which is barred by the four year statute of limitation.

IV. A CONCISE STATEMENT OF MATERIAL FACTS.

1. The four year statute of limitation ran in September, 1990 .

2. On March 28, 1991, a default for failure to answer the formal complaint was entered against the petitioner while he was out of the country.

3. A disciplinary hearing based on the default was held a year later on March 2, 1992, at the Law and Justice Center. Petitioner was present at the hearing.

4. On May 4, 1992, the Board of Bar Commissioners signed an Order Affirming the Findings, Conclusions and Recommendations of the Hearing Panel.

5. On May 19, 1992, petitioner filed a Motion for Reconsideration of the May 4, 1992 Order. Petitioner sought the

following remedy: "to have the proposed Findings of Fact, Conclusions of Law and Recommendation of Discipline dismissed, the default vacated, and Bar Counsel ordered to effectuate adequate and proper service of the Summons and Complaint upon the respondent". Petitioner's motion was granted.

6. On June 8, 1992, The Board of Bar Commissioner's signed an Order prepared by Bar Counsel granting petitioner's Motion for Reconsideration. The Order clearly failed to accurately reflect the sum and substance of petitioner's motion which had been granted.

7. On June 29, 1992, petitioner filed his Objection to the Order that had been signed on the ground that the Order

failed to properly reflect the merits of the matter before the Board of Bar Commissioner. Since the Order erroneously required the petitioner to file an answer, petition also filed a Motion to Quash the Summons.

8. On July 7, 1992, petitioner was personally served with the Summons and Formal Complaint in this matter. Petitioners answer was due on July 27, 1992.

9. On July 9, 1992, petitioner appeared before a Special Master by order of the Supreme Court on two charges of contempt of the supreme court by the petitioner. After the hearing, the Special Master requested a memorandum of law from petitioner and a reply memorandum from Bar Counsel.

10. Beginning on July 14, 1992 through

July 17, 1992, petitioner prepared the Memorandum of Law for the Special Master, the Notice of Suspension, the Notice of Compliance with Rule XVIII and the Answer to the Formal Complaint in this matter.

11. On July 17, 1992 petitioner took the final drafts of the Memorandum of Law, the Notice of Suspension, the Notice of Compliance with Rule XVIII and the Answer to the Formal Complaint for copying. After copying, petitioner thought he placed a copy of the Memorandum of Law, the Notice of Suspension, the Notice of Compliance with Rule XVIII and the original and a copy of the Answer in a large envelope which he delivered to the Law and Justice Center the same day. Unfortunately, petitioner was mistaken because he inadvertently put

the original and copy of the Answer back in his file.

12. On August 5, 1992, after receiving a copy of Bar counsel's Request to enter Default, petitioner checked his file and discovered his mistake. Petitioner also immediately filed his answer, although, it was 9 days late.

13. On August 10, 1992, the Board of Bar Commissioners denied petitioners Objection to the Order Granting Petitioner's Motion to Reconsider on the ground that petitioner's Objection was moot by the personal service of the Summons and Formal Complaint upon petitioner on July 7, 1992.

14. After a futile effort to convince Assistant Bar Counsel, Wendell Smith to stipulate to set aside the Default

Certificate, petitioner filed his Motion to Set Aside the Default Certificate on August 11, 1992.

15. The Board of Bar Commissioners have not acted on petitioner's Motion to Set Aside the Default Certificate, but it has already entered its Order Affirming Findings, Conclusion and Recommendation which led to this appeal being filed by the petitioner.

V. STATEMENT OF ISSUES PRESENTED BY THE APPEAL.

1. Is the delay of 9 days in filing petitioner's Answer to the Formal Complaint which was caused wholly by petitioners mistake in inadvertently placing the original and copy of the answer in his file rather than in the envelope containing a

copy of the Memorandum of Law for the Special Master, a Notice of Suspension, and the Notice of Compliance with Rule XVIII which envelope the petitioner delivered to Bar Counsel and Bar Director at the Law and Justice Center on July 17, 1992, such an unreasonable and inexcusable delay to penalize petitioner by entering a Default Order against him?

Applicable standard of appellate review and supporting authority: The findings of the Board of Bar Commissioners should be adopted unless they appear to be arbitrary or not in accord with the preponderance of the evidence. In re Bridwell, 474 P.2d 116 (Utah 1970).

2. Is the time for petitioner to file an Answer to the Formal Complaint

tolled and did not start to run until and after the Board of Bar Commissioners deny, on August 10, 1992, petitioner's Objection to the Order prepared by Bar Counsel granting petitioner's Motion for Reconsideration?

Applicable standard of appellate review and supporting Authority: The findings of the Board of Bar Commissioners should be adopted unless they appear to be arbitrary or not in accord with the preponderance of the evidence. In re Bridwell, 474 P.2d 116 (Utah 1970).

3. Is the Board of Bar Commissioner's Order Affirming Findings of Fact Conclusions of Law and Recommendation of Discipline premature in that the Board of Bar Commissioners still

has pending before it petitioner's Motion to Set Aside the Default Certificate?

Applicable standard of appellate review and supporting authority: The findings of the Board of Bar Commissioners should be adopted unless they appear to be arbitrary or not in accord with the preponderance of the evidence. In re Bridwell, 474 P.2d 116 (Utah 1970).

4. Is the proceedings against petitioner arising from the claim of Caren Serr barred by the four year statute of limitation?

Applicable standard of appellate review and supporting authority: The findings of the Board of Bar Commissioners should be adopted unless they appear to be arbitrary or not in accord with the

preponderance of the evidence. In re Bridwell, 474 P.2d 116 (Utah 1970).

VI & VII. STATEMENT WHETHER THE APPEAL IS SUBJECT TO ASSIGNMENT.

This appeal is not subject to assignment to the Court of Appeals because the Supreme Court has exclusive jurisdiction over this matter. Rule XIV, Procedures of Discipline of the Utah State Bar.

VIII. STATEMENT OF APPLICABLE STATUTES, RULES OR CASES.

1. Rule 60 (b), Utah Rules of Civil Procedures.

2. Ney v. Harrison, 5 Utah 2d 217, 299 P.2d 1114 (Utah 1956).

3. Westinghouse Elec. Soapily Co. v. Larsen, 544 P.2d 876 (Utah 1975).

4. Heath man v. Fabian, 14 Utah 2d 60, 377 P.2d 189 (Utah 1962).

5. Ma v. Thompson, 677 P.2d 1109 (Utah 1984).

6. Rule 29, Proposed Rules of Lawyer Discipline and Disability.

7. In re Bridwell, 474 P.2d 116 (Utah 1970).

IX. RELATED OR PRIOR APPEALS IN THE CASE.

None.

X. NECESSARY ATTACHMENTS:

1. Order sought to be reviewed.

2. Petitioner has no been served with the Findings of Fact, Conclusions of Law and Recommendation of Discipline that was supposed to have been affirmed by the Board of Bar Commissioners by the September 3, 1992 Order. Please note that the Order sought to be reviewed was not served upon petitioner, by mail, until after September 9, 1992.

3. Motions and Orders pursuant to Rules 50(a), and (b), 52(b), 54(b) and 59, Utah Rules of Civil Procedure. NONE.

4. Notice of appeal.

Petitioner respectfully submits this docketing statement this ___ day of October, 1992.

_____

A. Paul Schwenke,
Petitioner

CERTIFICATE OF HAND-DELIVERY

I hereby certify that I hand-delivered copies of the foregoing Docketing Statement to Mr. Wendell K. Smith, Assistant Bar Counsel, and to the Executive Director, both at 645 South 200 East, Salt Lake City, Utah 84111, and to Honorable Geoffrey J. Butler, Clerk of the Supreme Court, at 332 State Capitol, Salt Lake City, Utah 84114, this 1st0 day of October, 1992.

_____

A. Paul Schwenke

IN THE UTAH SUPREME COURT

IN RE A. PAUL SCHWENKE

PETITION FOR REHEARING

CASE NO. 920480

As the basis for his Petition for Rehearing, Petitioner sets forth the following:

1. The opinion of the Supreme Court is based entirely on matters outside the appropriate scope of review in this case.

The Supreme Court's Opinion is based solely on the affirmance of the default judgment entered on or about March 19, 1991 (and entered again on March 28, 1991). (See Record ("R.") at 24-27, and the Opinion of the Supreme Court dated December 1, 1993, at pages 5 through 7.) However, the issue of the validity of such default judgment was never one of the issues properly presented

to the Supreme Court for review pursuant to the Petition for Review of A. Paul Schwenke ("Schwenke").

The only order or judgment set forth as the subject of Schwenke's Petition for Review was the "Order Affirming Findings of Fact Conclusions of Law and Recommendation of Discipline," entered September 3, 1992 ("September 3, 1992 Order"). (See Notice of Appeal filed with the Clerk of the Supreme Court on October 2, 1992, and R. 142.) No cross-appeal or cross-petition was filed by the Utah State Bar in this case. Accordingly, the only order or judgment presented to this court for review in this appeal was such "Order Affirming Findings of Fact Conclusions of Law and Recommendation of Discipline," entered September 3, 1992.

It has long been the law of the State of Utah that issues not involved in the specific judgment or order appealed from cannot be considered and determined on appeal. See, Forbes v. Butler, 275 P. 772, 774 (Utah 1928) ("No appeal is taken from that part of the trial court's judgment on the accounting, hence the finding and the trial court's apparent view upon that question have no place in the record, and the question is not before us for determination."). Therefore, absent a cross-appeal or cross-petition presenting other issues for reveiw, the court could address only these issues which were inherently a part of the September 3, 1992 Order, which was the subject of the appeal. See, Terry v. Zions Co-Op Mercantile Inst.,

617 P. 2d 700, 702 (Utah 1980) (If the appellee wishes to argue for alteration of the judgment to enlarge his rights, such as to revive a claim rejected by the court below, he must file a cross-appeal or cross-petition.).

The Appellate Record and the applicable law clearly show that the only issues inherently included in a review of the September 3, 1992 Order were the following issues:

> 1) Whereas the September 3, 1992 Order was based on the default entered July 31, 1992, the issue of whether there was a factual and legal basis for the entry of the July 31, 1992 default was before the Court on Schwenke's Petition for Reveiw.
>
> 2) Whereas the September 3, 1992 Order impliedly denied Schwenke's Motion to Set Aside Default (concerning the July 31, 1992 default) the issue of whether the denial of

such motion to set aside default was erroneous was before the Court on Schwenke's Petition for Reveiw.

3) Whereas the September 3, 1992 Order affirmed the findings, conclusions and recomendations of the Hearing Board derived from evidence presented at the March 2, 1992 sanctions hearing, the issue of whether there was a factual and legal basis for such affirmance was before the Court on Schwneke's Petition for Review.

4) Whereas the issue of subject matter jurisdiction can be raised at any time in a proceeding, the issue of whether the Board of Commissioners had jurisdiction over the subject matter of the September 3, 1992 Order was before the Court on Schwenke's Petition for Review.

The Appellate Record was not properly paginated in chronological order in compliance with Rule 11(b) of the Rules of Appellate Procedure, which appears to have resulted in some confusion concerning the chronology of the procedural events in the

proceeding below. Therefore, in order for the Court to clearly understand which issues were inherently included in Schwenke's petition for review of the September 3, 1992 Order, a review of the proceedings below is necessary. A time line of the events in the tribunal below is summarized as follows:

1. The Utah State Bar filed a formal complaint on December 4, 1990, and then purportedly served the summons and complaint upon Schwenke, by sending a copy of the summons and complaint by certified mail to 165 South West Temple, Suite 100, Salt Lake City, Utah 84111, on or about December 4, 1990. (R. 1-10).

2. Based on such purported service of the summons and complaint, and based on Schwenke's failure to answer such complaint, identical default judgments were entered both on March 19, 1991, and again on March 28, 1991, as to the liability portion of the bar complaint. (R. 2427).

3. After a series of settings and re-settings of the sanctions hearing,

on or about December 6, 1991, a Notice of Hearing for a sanctions hearing scheduled for March 2, 1992, was mailed to Schwenke. (R. 79-80). Schwenke received actual notice of such hearing. (Supplemental Record ("S.R.") at 43-45).

4. Schwenke attended the sanctions hearing on March 2, 1992. (S.R. 28).

5. Following the sanctions hearing, the Hearing Panel submitted its Findings of Fact Conclusions of Law and Recommendation of Discipline of Hearing Panel on April 20, 1992. (R. 182-194).

6. On May 4, 1992, the Board of Commissioners of the Utah State Bar entered its Order Affirming Findings of Fact Conclusions of Law and Recommendation of Discipline (of the Hearing Panel). (S.R. 18).

7. On May 5, 1992, Schwenke filed his Motion for Reconsideration of the Order Affirming Findings of Fact Conclusions of Law and Recomendation od Discipline. (R. 110).

8.On May 28, 1992, a hearing was held on Schwenke's Motion for Reconsideration, and such motion was granted. (S.R. 19, 23).

9.Bar Counsel (rather than Schwenke) prepared the proposed "Findings and Order Granting Respondent's Motion for Reconsideration," which proposed findings and order was signed by the Board of Commissioners on June 8, 1992, but was not placed in the mail for service on Schwenke until June 16, 1992. (R. 19 through 24). Such Order required Schwneke to file and serve his answer to the formal complaint within 10 days of the date of the order. (R. 23).

10.On June 29, 1992, Schwneke filed a Motion to Quash service of the original summons and complaint. (R. 90-91). Also on June 29, 1992, Schwenke filed his Objection to the Findings and Order Granting Respondent's Motion for Reconsideration, objecting to the form and content of the order, on the grounds that it did not conform with the actual order and findings made by the Board of Commissioners at the May 28, 1992, Hearing. (R. 127-129).

11.On July 7, 1992 the Utah State Bar, without leave of the Board of Commissiners, issued a new summons and had Schwenke personally served with such newly issued summons and origianl complaint. (R. 92-94).

12.On July 31, 1992, a new default was entered based on the service of process completed on July 7, 1992. (R. 97-98).

13.On August 5, 1992, Schwneke filed his answer (which answer was prepared on July 15, 1992, but which was not filed until August 5, 1992, because of inadvertance). (R. 100-103).

14.On August 10, 1992, the Board of Commissioners denied Schwenke's Motion to Quash on the basis that it was "rendered moot by his personal service on July 7, 1992," and also denied Schwenke's Objection to the Findings and Order Granting Respondent's Motion for Reconsideration. (R. 137-138).

15.On August 10, 1992, Bar Counsel filed its Motion to Affirm Findings Conclusions and Recomendations of Hearing Panel. (R. 144-145).

16. Schwenke filed his Motion to Set Aside Default on August 11, 1992. (R. 102-103).

17. On September 3, 1992, in response to Bar Counsel's Motion to Affirm Findings Conclusions and Recommendations of Hearing Panel, and in response to Schwenke's Motion to Set Aside Default, the Board entered

its Order Affirming Findings of Fact Conclusions of Law and Recommendation of Discipline. (R. 142). It is this Order which is the subject of Schwenke's Petition for Review. (See Notice of Appeal filed with this Court on October 2, 1992.)

The Order of the Board of Commissioners granting Schwenke's Motion for Reconsideration constitutes the pivotal reference point in this case, for purposes of ascertaining the issues which were included within the scope of this appeal. Even though the Order of the Board of Commissioners granting Schwenke's Motion for Reconsideration (S.R. 19-23) is not the epitome of clarity, it is still clear that at the time the Board granted Schwenke's Motion for Reconsideration, at the minimum, the Board effectively vacated both the default judgment entered on March 19, 1991

(and on March 28, 1991), and the findings of fact, conclusions of law and recommendation of discipline entered May 4, 1992.

In Schwenke's Motion for Reconsideration, Schwenke expressly requested the following relief: "to have the proposed Findings of Fact, Conclusions of Law and Recommendation of Discipline dismissed, the default vacated, and Bar Counsel ordered to effectuate adequate and proper service of the summons and complaint upon the respondent." (R. 120-121). Accordingly, by granting Schwenke's Motion for Reconsideration, the Board should be deemed to have impliedly granted the requested relief, as follows, unless expressly stated otherwise: (1) an implied vacating of the Findings of Fact,

Conclusions of Law and Recomendation of Default entered on May 4, 1992, (2) an implied vacating of the default judgments entered on March 19, 1991, and on March 28, 1991, and (3) an implied ruling that the summons and complaint had not been properly served, and needed to be re-served.

The last page of the Findings and Order Granting Respondent's Motion for Reconsideration reads as follows:

> " CONCLUSIONS
> Based upon the foregoing findings, the Board concluded that, in the interest of fairness, Respondent should be allowed to present the merits of his position to the Hearing Panel and that his Motion for Reconsideration should be granted.
>
> ORDER
> Based upon the foregoing findings and conclusions, it is hereby Ordered that Respondent's Motion for Reconsideration be

> and the same hereby granted; it is further Ordered that Respondent file his answer to the Formal Complaint in the above-entitled action and serve a copy thereof on the Office of Bar Counsel within ten (10) days of the date of this Order."

(R. 23). Such Order contained no language inconsistant with a granting of the first two items of requested relief, above-described. However, the Order did contain express language which indicated the third item of requested relief, above-described, was not granted, wherein the Order required Schwenke to answer the formal complaint within 10 days, rather than requiring the Utah State Bar to re-serve the complaint. Therefore, such Order should be construed to have granted Schwneke's Motion for Reconsideration, in part, because the

default judgments entered on March 19, 1991, and on March 28, 1991, and vacated the findings of fact, conclusions of law and recommendation of discipline entered on May 4, 1992; additionally, such Order should be construed to have denied Schwenke's Motion for Reconsideration, in part, because it failed to grant his request to declare the original service of process improper and invalid.

Such Order (dated June 8,1992) was not vacated or amended by the tribunal below. Furthermore, such Order was not properly placed before this court for review as part of the subject matter of this appeal by either party. An order vacating a judgment, such as this one, is not a final order from which an appeal may be taken as a matter of

right. Van Wagenen v. Walker, 597 P.2d 1327, 1328 (Utah 1979). Rather, in order to appeal an interlocutory order such as the June 8, 1992 Order, the procedures of Rule 5 of the Utah Rules of Appellate Procedure ("EUROPE") must be followed. See, URAP Rule 5. Because the procedures for perfecting an interlocutory appeal of the June 8, 1992 Order were not followed, such Order is now the law of the case, and this Court has no jurisdiction to review such Order.

Finally, neither of the parties properly appealed the Order of the Board entered on August 10, 1992 (R. 137-138), which denied Schwenke's Motion to Quash and Schwenke's Objection to the Findings and Order Granting Respondent's Motion for Reconsideration. Accordingly, any issues

inherently included in that Order were not placed before the Supreme Court for review pursuant to this appeal, either, and could not be addressed by the Court pursuant to Schwenke's Petition for Review.

Because September 3, 1992 Order could only be based on the July 31, 1992 default, contrary to the Supreme Court's conclusion on page 5, paragraph 3, sentence 2 of its opinion, the depositive issue in this appeal was not whether Schwenke was properly served with process on December 4, 1990; rather, such issue was an issue that was a complete non-issue in relation to this appeal, which was improperly considered by the Court. Because the entire focus and thrust of the Supreme Court opinion was completely misplaced, misconstrued and wasted on that

non-issue (an issue clearly outside the scope of the issues before the court on appeal), there is no question that a rehearing is mandated in this case. To rule otherwise would only perpetuate what appears to have been, up to this point, an almost intentional violation of Mr. Schwneke's due process rights.

2. **There was no factual or legal basis for the entry of the July 31, 1992 default judgment, and the failure to set aside such default was clearly reversible error.**

The Findings and Order Granting Respondent's Motion for Reconsideration was signed on June 8, 1992 but was not served on Schwenke until June 16, 1992, and even then, was served only by mailing. (S.R. 23). Accordingly, the effective date of such

order for purposes of determining when Schwenke's answer to the formal complaint was due should be deemed to be June 19, 1992. See, URCP Rule 6(e). Accordingly, Schwenke's answer to the formal complaint was due on June 29, 1992, 10 ,days from such effective date.

Rule XI(c) of the Procedures of Discipline of the Utah State Bar provides that an answer to the formal complaint "may such defenses and motions as are permitted under the Utah Rules of Civil Procedure. Under URCP Rule 12(b), as the initial response to a complaint, a defendant may serve a motion alleging the insufficiency of process or service of process, in lieu of filing an answer. URCP Rule 12(b). If such a motion is filed in lieu of an answer, the

time for serving the answer is altered, and the time for filing the answer is tolled until ten (10) days after the court enters an order denying such motion. URCP Rule 12(a).

In this case, Schwenke filed a timely motion to quash service, which was the equivalent of a motion asserting insufficiency of process or service of process under URCP 12(b)(4) or (5). Accordingly, pursuant to URCP Rule 12(a)(1), Schwenke had a legal right to file his answer within ten (10) days after the Order denying his Motion to Quash was entered. The Order denying his Motion to Quash was not entered until August 10, 1992. Therefore, Schwenke's answer, filed on August 5, 1992, was timely filed. Because Schwenke's answer

was timely filed, there was no basis whatsoever for the entry of the July 31, 1992 default judgment. Accordingly, the setting aside of such default was not discretionary on the part of the Board, but rather, was mandatory. Therefore, the refusal of the Board of Commissioners to set aside the July 31, 1992 default was clearly reversible error.

Bar counsel argues that, because it issued a new summons, nineteen (19) months after filing the formal complaint, while Schwenke's timely Motion to Quash was still pending, the provisions of URCP Rule 12(a) (which tolled the time for filing Schwneke's answer) could somehow be totally ignored, and that Schwneke was required to file his answer within 20 days of such new service of

process. However, this argument is without basis. Although Rule XI(b) of the Procedures of Discipline of the Utah State bar does not specify a time deadline for service of the summons and complaint, by analogy to URCP Rule 4(b), the Bar was required to obtain leave of the Board of Commissioners before serving a summons and complaint more than 120 days after filing of the complaint. See, URCP Rule 4(b). The first time that the Board made any ruling that could possibly be deemed to have validated such service of process was August 10, 1992, when the Board ruled that such service of porcess mooted Schwenke's Motion to Quash. (R. 137). Accordingly, the only rational application of URCP Rule 12(a) to the facts of this case would set a deadline

of August 20, 1992, for the filing of Schwenke's answer--10 days after the motion to quash was denied, and 10 days after the Bar's untimely service of process was validated and ratified. To rule otherwise would eviscerate the provisions of URCP Rule 12(a). Firthermore, any question about the validity of the default should be resolved in favor of setting it aside. Board of Education of Granite School Dist. v Cox, 384 P. 2d 806, 807 (Utah 1963); Locke v Peterson, 285 P. 2d 1111, 1113 (Utah 1955).

Finally, the July 31, 1992 default should have been set aside on the grounds of excusable neglect or inadvertance. Schwneke filed a timely URCP Rule 60(b) motion to set aside such default. (R. 102-103). Schwenke's allegations concerning excusable

neglect and inadvertence were credible and unrebutted. (R. 102-103). Finally, it was clear from Schwenke's answer as well as from the testimony taken at the March 2, 1992 sanctions hearing that Schwenke had valid defenses to the allegations of the complaint. (R. 100-101; S.R. 121-142, 229-231). Because Schwenke's answer would have been timely by any standard had it been filed on July 15, 1992, and because the filing of such answer was delayed until August 5, 1992, only through inadvertence or excusable neglect, there is no question that the default should have been set aside, under the applicable law. See, May v. Thompson, 677 P.2d 1109, 1110 (Utah 1984); Board of Education of Granite School Dist. v. Cox, supra, 384 P.2d at 807. Accordingly,

under every plausible theory, it was reversible error to refuse to set aside the July 31 default judgment.

3. **The September 3, 1992 Order was entered without the Board holding a new sanctions hearing following the July 31, 1992 default, as required by Rule XI(d) of the Procedures of Discipline of the Utah State Bar.**

Rule XI(d) of the procedures of the Utah State Bar states the following:

> "Default. In the event the attorney fails to file and serve his answer to the Formal Committee Complaint within the time established, he shall be deemed to have admitted the allegations and charges in the said Complaint and the Board shall enter the attorney's default. The Board shall thereupon fix a time and place for hearing, notice of which shall be given to Bar Counsel and the attorney, and shall thereupon proceed to hear and receive evidence and argument with respect to the discipline, if any, to be imposed or recommended."

At the first sanctions hearing, Schwenke indicated a desire to put on additional evidence at a later date. (S.R. 30-31). After the July 31, 1992 default, pursuant to Rule XI(d) of the Procedures of Discipline of the Utah State Bar, Schwenke had a right to a new hearing on the issues of sacntions. Because Schwenke was denied that right. the September 3, 1992 Order should be vacated.

4. **The Board of Commissioners had no subject matter jurisdiction to discipline Schwenke by prohibiting him from engaging in any activity other than the "practice of law."**

In Recommendation No. 5 of the Recommendation of Discipline affirmed by the Board in its September 3, 1992 Order, the Board prohibited Schwenke from maintaining a presence in or occupying an office where the

practice of law is conducted, and directed him to take such actions necessary to cause the removal of any indicia as a legal assistant, paralegal, law clerk or similar title, and in all other aspects to refrain from acting in such capacities. (R. 193-194). Although the Board had subject matter jurisdiction to regulate Schwneke's practice of law, it certainly had no subject matter jurisdiction to regulate activities for which no law license is required in the State of Utah. Therefore, that portion of the September 3, 1992 Order which attempts to regulate Schwneke's subletting of office space, and attempts to regulate Schwenke's employment as a legtal assistant, law clerk or paralegal should be declared to be null and void and of no legal effect. In the

State of Utah anyone who has the ability to do so may participate in these activities without a license to parctice law.

5. **The restitution order in this case was not based on the victim's actual loss, and therefore, should be remanded for further determination.**

Even according to the allegations of the complaint (which were deemed to be admitted), the amount of restitution ordered was excessive, because it bears no relationship to the victim's actual out-of-pocket loss. The allegations of the complaint state that the actual amount of the total settlement by Schwenke on behalf of Caren Serr was $93,539.48. In addition, the allegations of the complaint also asserted that Schwenke was entitled to an attorneys fee of $26,191.05, and that Caren

Serr actually received at least $15,810.00 of the settlement monies, and additional payments from Schwenke of at least $2,500-00. (R. 186-187). This complaint was an exhibit introduced at the March 2, sanctions hearing. (R. 181-189).

Finally, included in the Appellate Record as an exhibit to the Bar's Motion to Consolidate are the conclusions of law of Judge Rokich, stating that Caren Serr had received $15,000.00 from Bruce Udall (Schwenke's law partner) as partial payment of the settlement monies (R. 49).

Therefore, the victim's loss, even according to the a allegations of the Bar could have been no more than $34,038,43, and could have been much less ($93,539.48 - $26,191.05 - $15,810.00 - $2,500.00 - $15,000.00).

Accordingly, this issue should be remanded to the Board for a new determination based on Caren Serr's actual loss.

6. **The Appelate Record does not comply with Rule 11(b) of the Utah rules of Appelate Procedure.**

The clerk of the tribunal of Board of Commissioners had a duty to paginate all original papers in chronological order, and to prepare a chronological index of those papers. URAP Rule 11(b). This was not done in this case, and has resulted in a confusion of the issues on appeal.

7. **The Court's determination that the March 2, 1992 hearing constituted a "full-scale hearing on the merits of the allegations against [Schwneke]" was clearly erroneous.**

On page 7 of the opinion, the Supreme Court stated the following: "Although

Schwenke was in fact in default, he was nevertheless afforded a full-scale hearing on the merits of the allegations against him." This determination, which appears to be part of the basis of the court's affirmance on appeal, is clearly erroneous. Rule XI(d) of the Procedures of Discipline of the Utah State Bar states that in the evnet of a default, the allegations of the complaint are to be deemed admited, and therfore, a hearing is to be held to "hear and receive evidence and argument with respect to the discipline, if any, to be imposed or recommended." Accordingly, even the applicable procedural rules did not give the Hearing Panel jurisdiction to conduct a full hearing on the merits of the allegations. Nothing in the Appellate

Record (including the notice of the sanctions hearing) indicated that the sanctions hearing was anything other than a sanctions hearing. Finally, when Schwenke did put on evidence of his innocence at the sanctions hearing, the only result was that the Hearing Panel determined that Schwneke refused "to acknowledge the wrongful nature of his conduct." (R. 192, paragraph 5). Because such determination is clearly erroneous, Schwenke's Petition for Rehearing should be granted.

8. **The Court's determination that the original service of summons and complaint was adequate was erroneous, and was based in part on incompetent evidence.**

In finding that the original service of the summons and complaint--by mail, on December 4, 1990--was adequate, the Court

ignored the fact that the Bar did not even comply with its own rule concerning service. Such service by mailing was required to be made to Schwenke's "last known address as shown by the official roster of attorneys of the Bar." However, Bar Counsel mailed such summons and complaint to 165 South West Temple, Suite 300, Salt Lake City, rather than to the "last known address shown by the official roster of attorneys of the Bar." Accordingly, such service is invalid as a matter of law. Furthermore, the only evidence on which Bar Counsel bases its repeated assertion, that Jamis Johnson assured Bar Counsel he would pass Schwenke's mail on to Schwenke, is incompetent evidence--namely, hearsay evidence contained in an affidavit. (R. 171-172). See, Gunnar

v. Brice, 565 P.2d 1212, 1214 (Wash. App. 1977); Treloggan v. Treloaggan, 699 P.2d 747, 748 (Utah 1985) Norton v. Blackham, 669 P. 2d 857, 859 (Utah 1983)

CONCLUSION

Based on the foregoing, Petitioner requests that his Petition for Rehearing be granted.

_____

Paul Johnson, Advisory Counsel,
for Petitioner Pro Se

RULES OF PROFESSIONAL CONDUCT
Utah State Bar
Effective January 1, 1988
Preamble: A Lawyer's Responsibilities

RULE XI
PROCEEDING ON FORMAL COMMITTEE COMPLAINT

(b) Service, Bar Counsel shall cause to be served upon the attorney in question a copy of the Formal Committee Complaint and a summons, the later of which shall require the attorney to appear and answer said Formal Committee Complaint within 20 days after service. Service shall be made personally upon the attorney in question or by registered or certified mail to the last known address as shown by the official roster of attorneys of the Bar. Three additional days shall be allowed to answer the Formal Committee Complaint in the event

that service is accomplished by mail. Proof of service of the summons and Formal Committee Complaint shall be made by affidavit of the person making such service or by a certificate of mailing by registered or certified mail or by the affidavit of Bar Counsel that such mailing has been accomplished.

UTAH RULES OF CIVIL PROCEDURE

Rule 4. Process

(b) **Time of service.** In an action commenced under Rule 3(a)(1), the summons together with a copy of the complaint shall be served no later than 120 days after the filing of the complaint unless the court the court allows a longer period of time for good cause shown. If the summons and

complaint are not timely served, the action shall be dismissed, without prejudice on application of any party or upon the court's own initiative. In any action brought against two or more defendants on which service had been obtained on one of them within the 120 days or such longer period as may be allowed by the court, the other or others may be served or appear at any time prior to trial.

(d) **By whom served.** The summons and complaint may be served in this state or any other state or territory of the United States, by the sheriff or constable, or by the deputy of either or by a United States Marshall or by the marshal's deputy, or by any other person 18 years of age or older at the time of service, and not a party to the

action or a party's attorney. of either,

(e) Personal Service. Personal service shall be made as follows:

(1) Upon any individual other than one covered by subparagraphs (2) (3) or (4) below, by delivering a copy of the summons and the complaint to the individual personally, or by leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion there residing, or by delivering a copy of the summons and/or complaint to an agent authorized by appointment or by law to receive service of process;

(g) Other service. Where the identity or whereabouts of the person to be served are

unknown and cannot be ascertained through reasonable diligence, where service upon all of the individual parties is impracticable under the circumstances, or where there exists good cause to believe that the person to be served is avoiding service of process, the party seeking service of process may file a motion supported by affidavit requesting an order allowing service by publication, by mail, or by some other means. The supporting affidavit shall set forth the efforts made to identify, locate or serve the party to be served, or the circumstances which make it impracticable to serve all of the individual parties. If the motion is granted, the court shall order service of process by publication, by mail from the clerk of the court, by other means,

or by some combination of the above, provided that the means of notice employed shall be reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action to the extent reasonably possible or practicable. The court's order shall also specify the content of the process to be served and the event or events as of which service shall be deemed complete. A copy of the court's order shall be served upon the defendant with the process specified by the court.

RULES OF PROFESSIONAL CONDUCT
Utah State Bar
Effective January 1, 1988
Preamble: A Lawyer's Responsibilities

RULE XI
PROCEEDING ON FORMAL COMMITTEE COMPLAINT

(C) Answer. The attorney in question shall file his answer to the Formal Committee Complaint in writing with the office of the executive Director of the Bar within the time allowed or such further time as the Board upon good cause shown, may grant. The Answer shall admit or deny the allegations of the Formal Committee Complaint and may raise such defenses and motions as are permitted under the Utah Rules of Civil Procedure. A copy of the Answer shall be served upon Bar Counsel who may thereafter file a reply as to new

matters raised by the answer. The Board shall proceed to hear the case on the issues framed by the pleading and motions, if any, and notice shall be given to Bar Counsel and the attorney of the time and place of such hearing.

(d) Default. In the event the attorney fails to file and serve his answer to the Formal Committee Complaint within the time established, he shall be deemed to have admitted the allegations and charges in the said Complaint and the Board shall enter the attorney's default. The Board shall thereupon fix a time and place for hearing, notice of which shall be given to Bar Counsel and the attorney, and shall thereupon proceed to hear and receive evidence and argument with respect to

discipline, if any, to be imposed or recommended.

(h) Filing. The originals of all pleadings, motions, orders, etc., shall be filed with the Executive Director of the Bar, who shall function as clerk in all disciplinary Formal Committee Complaint proceedings. Copies of all such documents shall be mailed or delivered to the attorney or his counsel and all members of the designated hearing committee.

RULE XII

(a) Hearing Committee Panel. All Formal Committee Complaints will be submitted to and heard before a committee of two members of the Bar selected by the Board and one public member appointed by the

Supreme Court. The Board shall appoint twelve members of the Bar to act on the Hearing Committee Panel, consisting of two attorneys from the first and second divisions, two attorneys from the fourth and fifth divisions and, six attorneys from the third division and two at-large attorneys from any divisions. In addition, six public members of the Hearing Committee Panel shall be appointed by the Supreme Court. All regular terms shall be three years, and no member shall serve more than two consecutive three-year terms. Provided, however, for the initial appointments to the Hearing Committee Panel, one member of the Bar from the first and second divisions shall be appointed for one year, and one shall be appointed for three years; one member of the

Bar from the fourth and fifth divisions shall be appointed for two years and one for three years; two members of the Bar from the third division shall be appointed for one year, two shall be appointed for two years and two shall be appointed for three years and the public members shall be appointed one for one year, two for two years and two for three years. The President of the Bar shall assign a hearing committee to a particular case and shall name a hearing committee chairman from the Committee in each case.

(b) Evidence. The rules of evidence and procedure applicable to the conduct of non jury civil trials in the district courts of the state of Utah shall govern the hearing on a Formal Committee Complaint. A

verbatim recording shall be maintained by electronic and/or stenographic means.

(c) Burden and Standard of Proof. The burden of proof shall be on Bar Counsel to sustain the Formal Committee Complaint, or various counts thereof by clear and convincing evidence.

(d) Personal Attendance by the Attorney. Unless excused from attendance by the chairman of the Hearing Committee for good cause shown, the attorney whose conduct is the subject of the hearing shall attend the hearing in person and shall answer any questions put to him by Bar Counsel and the Hearing Committee.

(e) Findings, Conclusions and Recommendation. After the hearing is completed, the Hearing Committee shall make

written findings of fact, conclusions of law and its recommendation as to the discipline of the attorney and shall submit the same to the Board. The Board shall review and consider the findings, conclusions and recommendation of the Hearing Committee determinations in whole or part. The findings, conclusions and recommendation shall then be entered by the Board either dismissing the complaint or recommending disbarment, suspension, probation, public reprimand, restitution and/or costs. A copy of the findings, conclusions and recommendation shall be served upon Bar Counsel and the attorney in question or his counsel.

(f) Petitions for Amendment, Modification or Reconsideration. Within 10

days of service of the Board's findings, conclusions and recommendation, Bar Counsel or the attorney in question may petition the Board to amend, modify or reconsider the findings, conclusions and recommendation. The petition shall be filed with the executive Director of the Bar. The petition shall specify any proposed amendment or modification and any reasons advanced for reconsideration. The petition may be supported by legal argument and may be accompanied by a request for oral argument. The Board shall permit oral argument on the petition if requested.

(g) Transmittal to Supreme Court. Upon all proceedings before the Board having been concluded, in the event that discipline is recommended, a certified copy of the

Board recommendation setting forth the recommended discipline, accompanied by the findings of fact and conclusions of law, shall be forthwith forwarded to the clerk of the Supreme Court, and copies thereof shall be served upon the attorney in question and Bar Counsel.

(h) Public Access to Proceedings. Upon the filing of a Formal Committee Complaint, the pleadings in the matter shall be open to the view of all interested persons. Evidentiary hearings conducted by the Hearing Committee shall be open to the public. The findings of fact, conclusions of law and recommendation of the Hearing Committee and Board shall be open to all interested persons.

(i) Ex Parte Communications

Prohibited. Neither Bar Counsel nor members of the disciplinary staff shall engage in ex parte communications with members of the Board or members of the Hearing Committee concerning any disciplinary case that is being or may be considered by the Board of the Hearing Committee.

Rule 6. Time

. . .

(e) **Additional time after service by mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

Rule 12. Defenses and objections.

(a) **When presented.** A defendant shall serve his answer within twenty days after the service of the summons and complaint is complete unless otherwise expressly provided by statute or order of the court. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) **How presented.** Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of

jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law

or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 4-504. Written orders, judgments and decrees.

Intent:

To establish a uniform procedure for submitting written orders, judgments, and decrees to the court. This rule is not

intended to change existing law with respect to the enforceability of unwritten agreements.

Applicability:

This rule shall apply to all civil proceedings in courts or record except small claims.

Statement of the Rule:

(1) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen days, or within a shorter time as the court may direct, file with the court a proposes order, judgment, or decree in conformity with the ruling.

(2) Copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the court for signature unless the court

otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service.

(3) Stipulated settlements and dismissals shall also be reduced to writing and presented to the court for signature within fifteen days of the settlement and dismissal.

(4) Upon entry of judgment, notice of such judgment shall be served upon the opposing party and proof of such service shall be filed with the court. All judgments, orders, and decrees, or copies thereof, which are to be transmitted after signature by the judge, including other correspondence requiring a reply, must be accompanied by pre-addressed envelopes and pre-paid postage.

(5) All orders, judgments, and decrees shall be prepared in such a manner as to show whether they are entered upon the stipulation of counsel, the motion of counsel or upon the court's own initiative and shall identify the attorneys of record in the cause or proceeding in which the judgment, order or decree is made.

(6) Except where otherwise ordered, all judgments and decrees shall contain the address or the last known address of the judgment debtor and the social security number of the judgment debtor if known.

(7) All judgments and decrees shall be prepared as separate documents and shall not include any matters by reference unless otherwise directed by the court. Orders not constituting judgments or decrees may be

made a part of the documents containing the stipulation or motion upon which the order is based.

(8) No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

(9) In all cases where judgment is rendered upon a written obligation to pay money and a judgment has previously been rendered upon the same written obligation, the plaintiff or plaintiff's counsel shall attach to the new complaint a copy of all previous judgments based upon the same written obligation.

(10) Nothing in this rule shall be construed to limit the power of any court, upon a proper showing, to enforce a settlement agreement or any other agreement which has not been reduced to writing.

63-46b-8. Procedures for formal adjudicative proceedings

- Hearing procedure.

(1) Except as provided in Subsections 63-46b-3(d)(i) and (ii), in all formal adjudicative proceedings, a hearing shall be conducted as follows: . . . . . .

(g) The hearing shall be recorded at the agency's expense.

Rule 81. Appilcability of rules in general.

(a) **Special statutory proceedings.** These

rules shall apply to all special statutory proceedings, except insofar as such rules are by their nature clearly inapplicable. Where a statute provides for procedure by reference to any part of the former Code of Civil Procedure, such procedure shall be in accordance with these rules.

No._____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

A. PAUL SCHWENKE,
Petitioner,

vs.

UTAH STATE BAR,
Respondent

AFFIDAVIT OF JAMIS M. JOHNSON

STATE OF UTAH)
:ss
SALT LAKE COUNTY)

JAMIS M. JOHNSON, after being first duly sworn, deposed, states as follows:

1. I have read the affidavit of Stephen Trost, alleged Bar Counsel for the Utah State Bar in 1990.

2. I dispute each and every allegation contained in Stephen Trost's affidavit.

3. Specifically, I know I did not meet with Stephen Trost in or about December, 1990 or anytime before December 4, 1990.

4. I knew in December, 1990 that A. Paul Schwenke was in the process of moving out of state, but I also knew he did not leave until mid-January, 1991. So, I would not have made any representation on December 4, 1990 that A. Paul Schwenke had left the state because it had not happened yet.

6. I also knew for a fact, that Wilma Schwenke, Paul Schwenke's ex-wife, was still doing accounting work at my office in December, 1990 and did not leave for Las Vegas until February, 1991. Therefore, I could not have made a statement on December 4, 1990 about Wilma's address in Las Vegas

because it hadn't happened yet and I don't have a crystal ball.

Dated this 13th day of June, 1994.

JAMIS M. JOHNSON

SUBSCRIBED AND SWORN TO BEFORE ME, this 13th day of June, 1994

Notary Public
DEBORAH L. DOHERTY
10 West Broadway
Salt Lake City, Utah 84101
My Commission Expires
February 28, 1996
State of Utah

NOTARY PUBLIC, residing in Salt Lake County.

My Commission expires:
2/28/96

A. Paul Schwenke #3951
Attorney Pro Se
75 East 400 South #300
Salt Lake City, Utah 84101
Telephone: 801 530-0100

IN THE UTAH SUPREME COURT

In the Matter of the
Complaint by CAREN SERR,

BRIEF OF
PETITIONER.

against

PAUL SCHWENKE,
DOB: 10-12-51
ADM: 05-09-83

Petitioner,

No. 920480

vs.

Case Number below:
F-322

Utah State Bar,

Priority 5

Respondent.

PARTIES

John C. Baldwin
Executive Director
Board of Bar Commissioners
Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111

Wendell K. Smith
Office of Bar Counsel
Law and Justice Center
645 South 200 East
Salt Lake City, Utah 84111

A. Paul Schwenke
Petitioner
75 East 400 South, #202
Salt Lake City, Utah 84111

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JURISDICTION OF THE SUPREME COURT

Appellate jurisdiction is proper pursuant to the following authorities:

1. Rule XIV(a), Procedure of Discipline of the Utah State Bar.
2. Constitution of Utah, Art. VIII, 4.

ISSUES PRESENTED ON APPEAL

1. Is the delay of 9 days in filing Petitioner's Answer to the Formal Complaint, caused wholly by Petitioner's mistake in inadvertently placing the original and copy of the Answer in his file rather than in the envelope containing a copy of the Memorandum of Law for the Special Master, a Notice of Suspension, and the Notice of Compliance with Rule XVIII which envelope the Petitioner delivered to Bar Counsel at the Law and Justice Center on July 17, 1992,1 such an unreasonable and inexcusable delay to penalize petitioner by entering a Default Order against him?

Applicable standard of appellate review and supporting authority: Since the Board of Bar Commissioners failed to

rule on Petitioner's Motion to Set Aside the Default Certificate, the standard of review should be that applicable to the lower courts, that is, the court should be liberal in granting relief against judgments taken by default so that the controversies may be tried on the merits. Additionally, the policy codified in Rule 60(b),

The confusion was apparently the result of Petitioner being overly cautious not to put the Answer in the envelope intended for the Special Master. Utah R.Civ.P. should be controlling, that is, a party genuinely is mistaken to a point where, absent such mistake, default would not have occurred, the equity side of the court would grant relief. State by and thru. Depart. of Social Services v. Mussel man, 667 P.2d 1053 (Utah

1983) and May v. Thompson, 677 P.2d 1109 (Utah 1984).

2. Is the time for Petitioner to file an Answer to the Formal Complaint tolled and did not start to run until and after the Board of Bar Commissioners deny, on August 10, 1992, Petitioner's Objection to the Order, prepared by Bar Counsel, granting Petitioner's Motion for Reconsideration?

Applicable standard of appellate review and supporting authority: The standard of review should be that applicable to the lower courts, that is, the court should be liberal in granting relief against judgments taken by default so that the controversies may be tried on the merits. Additionally, the policy codified in Rule

60(b), Utah R.Civ.P. should be controlling, that is, if a party genuinely is mistaken to a point where, absent such mistake, default would not have occurred, the equity side of the court would grant relief. State by and thru. Depart. of Soci Services v. Musselman, 667 P.2d 1053 (Utah 1983) and May v. Thompson 677 P.2d 1109 (Utah 1984).

3. Is al the Board of Bar Commissioner's Order Affirming Findings of Fact Conclusions of Law and Recommendation of Discipline premature in that the Board of Bar Commissioners still has pending before it petitioner's Motion to Set Aside the Default Certificate?

Applicable standard of appellate review and supporting authority: The standard of review should be that applicable

to the lower courts, that is, the court should be liberal in granting relief against judgments taken by default so that the controversies may be tried on the merits. Additionally, the policy codified in Rule 60(b), Utah R.Civ.P. should be controlling, that is, if a party genuinely is mistaken to a point where, absent such mistake, default would not have occurred, the equity side of the court would grant relief. State by and thru. Depart. of Social Services v. Musselman, 667 P.2d 1053 (Utah 1983) and May v. Thompson, 677 P.2d 1109 (Utah 1984).

4. Is the proceedings against Petitioner arising from the claim of Caren Serr barred by the four year statute of limitation? The record lacks facts sufficient to a determination of this issue.

Accordingly, Petitioner will not address this issue in this brief but instead, Petitioner respectfully requests that this issue be remanded to afford Petitioner the opportunity to present supporting evidence.

RULE DETERMINATIVE OF THE ISSUES PRESENTED

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; ... Rule 60 (b)(1), Utah Rules of Civil Procedures. (Emphasis added).

STATEMENT OF THE CASE

This petition is to review the propriety of the failure of the Board of Bar Commissioners to hear Petitioner's Motion to Set Aside the Default Certificate and to review the adequacy of the grounds offered by Petitioner as basis for this Court to set aside the Default Certificate and the Order Affirming Findings of Fact, Conclusions of Law and Recommendation of Discipline.

I. OBJECTION TO THE RECORD

Petitioner objects to the record as certified to the court on the following grounds: (1) The record is incomplete because it does not include Petitioner's responses to the Notice of Complaint and the Order Affirming Findings of Fact, Conclusions of Law and Recommendation of

Discipline, which was vacated as a result of Petitioner's Motion for Reconsideration. (2) The record is unfair and prejudicial because it included matters totally unrelated to the pending case: (a) and an allege letter from a Ron Serr (Record, pages 18, 19 and pages 169, 170); the Formal Complaint in F-478 matter (Record, pages 60 through 70); judgment and related findings in a civil case, Serr v. A. Paul Schwenke and Bruce Udall (Record pages 40 through 49) and unrelated correspondents (Record, pages 176 through 178). (3) The record is also unfair and prejudicial because it included several copies of the Formal Complaint giving its unproven allegations undue emphasis (Record pages 2 through 10, pages 51 through 59,

pages 153 through 162. (4) The order of the documents and entries in the record are misleading. For example, the Motion to Set Aside Default

Certificate (Record, pages 102 and 103) appears before the series of documents in connection with the Motion for Reconsideration (Record, pages 104 through 127), thus giving the false impression that the Motion to Set Aside Default Certificate had been heard by the Board of Bar Commissioners. Additionally, there are five Default documents (Record, pages 24 and 25; pages 26 and 27; pages 98 through 99; pages 179 and 180; and pages 230 through 231), clearly giving the false impression that Petitioner had been defaulted five times when in fact, it was only once when the Petitioner was out of the country and the 9 day delay in filing Petitioner's Answer due to a clear and undisputed mistake

and inadvertence by Petitioner.

II. CONCISE STATEMENT OF MATERIAL FACTS.

A. Facts leading to the first default certificate.

1. Petitioner left the State of Utah in the middle ofJanuary, 1991. Record, page 124.

2. On March 19, 1991, a default for failure to answer the Formal Complaint was entered against the Petitioner while he was out of the country. Record, page 24. Another Default Certificate was entered 9 days later on March 28, 1991. Record, page 26.

3. A Sanctions hearing was requested on March 28, 1991 (Record, page 28) and a Notice of Hearing was set on May 24, 1991 (Record, page 30) for a trial set for July

22, 1991. Record, page 30.

4. On July 16, 1991, and prior to the scheduled hearing set for July 22, 1991, Bar Counsel moved to continue the hearing for 30 isle days to allow the Office of ~ar Counsel to perfect service upon Petitioner. Record, page 31. There is no Order granting or denying Bar Counsel's Motion.

5. On November 22, 1991, Wendell K. Smith, Assistant Bar Counsel filed a Request for Sanctions Hearing (Record, page 75) and a hearing was set for March 2, 1992 (Record, page 79).

6. Petitioner was informed of the scheduled hearing when he returned to the State in February, for a preliminary hearing in the Third District Court. Petitioner appeared at the Sanctions hearing on March

2, 1992 and voiced his objections to the proceedings.

7. On March 16, 1992, Petitioner moved the Board of Bar Commissioners to hold all pending matters in abeyance during the pendency of a pending criminal case against Petitioner. Record, pages 82 and 83.

8. On May 4, 1992, the Board of Bar Commissioners denied Petitioner's Motion to Hold Matters in Abeyance. Record, pages 197 through 199.

9. On May 5, 1992, Petitioner filed his Motion for Reconsideration of the Order Affirming the Findings of Fact, Conclusions of Law and Recommendation of Discipline (the missing Order) Record, pages 110 and 200; with a supporting memorandum (Record, pages 111 through 123 and pages 201

through 211) and supporting affidavits (Record, pages 124 through 126). Petitioner sought the following remedy: "to have the proposed Findings of Fact, Conclusions of Law and Recommendation of Discipline dismissed, the default vacated, and Bar Counsel ordered to effectuate adequate and proper service of the Summons an Complaint upon the Respondent". The Petitioner's Motion was granted after a hearing before the Board of Bar Commissioners.

10. On June 8, 1992, The Board of Bar Commissioners entered an Order, prepared by Assistant Bar Counsel, Wendell K. Smith, granting Petitioner's Motion for Reconsideration. Record, pages 213 through 221. The Order was served upon Petitioner by mail on June 16, 1992. Record, pages

200 and 221. The Order clearly failed to accurately reflect the sum and substance of Petitioner's Motion and the remedy sought which had been granted.

7. On June 29, 1992, Petitioner timely filed his Objection to the Order that had been signed on the ground that the Order failed to properly reflect the mayoralties of the matter before the Board of Bar Commissioner. Record, pages 222 through 224. Since the Order erroneously required the Petitioner to file an Answer, Petitioner also filed a Motion to Quash the Summons. Record, pages 225 through 226.

B. Facts leading to the second Default Certificate.

8. On July 7, 1992, Petitioner was personally served with the Summons and

Formal Complaint in this matter while Petitioner's Objections to the Order granting Petitioner's Motion was still pending. Record, pages 92 and 93, pages 132 through 134, and pages 227 through 229. Petitioner's Answer was due July 27, 1992.

9. On July 9, 1992, Petitioner appeared before a Special Master by order of the Supreme Court on two charges of contempt on an unrelated matter. After the hearing, the Special Master

requested a memorandum of law from Petitioner. Recordpages 102 and 103.

10. Beginning on July 14, 1992 through July 17, 1992, Petitioner prepared the Memorandum of Law for the Special Master, the Notice of Suspension, the Notice of Compliance with Rule XVIII and the Answer to the Formal Complaint in this matter. Record, pages 102 and 103.

11. On July 17, 1992, Petitioner took the final drafts of the Memorandum of Law, the Notice of Suspension, the Notice of Compliance with Rule XVIII and the Answer to the Formal Complaint in this matter, for copying. After copying, Petitioner thought he placed a copy of the Memorandum of Law, the Notice of Suspension, the Notice of Compliance with Rule XVIII and the original

and a copy of the Answer in a large envelope which he hand-delivered to the Office of Bar Counsel, the same day. Record, pages 102 and 103.

12. Unfortunately, Petitioner was mistaken because he inadvertently put the original and copy of the Answer back in his file. Record, pages 102 and 103.

13. On August 5, 1992, after receiving a copy of Bar counsel's Request to enter Default, Petitioner checked his file and discovered his mistake. Petitioner also immediately filed his Answer, although, it was 9 days late. Record, pages 102, 103 and pages 135 and 136.

14. On August 10, 1992, the Board of Bar Commissioners denied Petitioners

Objection to the Order Granting Petitioner's Motion to Reconsider on the ground that petitioner's Objection was moot by the personal service of the Summons and Formal Complaint upon Petitioner on July 7, 1992. Record, page 137.

15. Also on August 10, 1992, unbeknownst to Petitioner, Assistant Bar Counsel, Wendell K. Smith, filed his Motion to Affirm the Findings of Fact, Conclusions of Law and Recommendation of Discipline. Record, pages 144 through 151.

16. On August 11, 1992, after a futile effort to convince Assistant Bar Counsel, Wendell Smith, to stipulate to set aside the Default Certificate, Petitioner filed his Motion to Set Aside the Default Certificate. Record, pages 102 and 103.

17. On September 3, 1992, the Board of Bar Commissioners entered its Order Affirming Findings'of Fact, Conclusions of Law and Recommendation, notwithstanding that Petitioner's Motion to Set Aside the Default Certificate, was still pending. Record, pages 142 and 143.

C. Facts bearing on Petitioner's meritorious defense.

18. The Board of Bar Commissioners failed to hear Petitioner's Motion to Set Aside the Default Certificate, thus, Petitioner did not have an opportunity to present evidence in support of his claim to a meritorious defense. Accordingly, the Petitioner's Answer denying each and every charging allegation of the Formal Complaint should be sufficient to raise a meritorious

defense for purposes of setting aside the Default Certificate.

SUMMARY OF ARGUMENTS

1. Under Point One: The genel policy codified in Rule 60(b), Utah Rules of Civil Procedure is controlling in this case. That policy requires this court to set aside the Petitioner's default and the resulting Order Affirming Findings of Fact, Conclusions of Law and Recommendation of Discipline if the default was the result of Petitioner's mistake. Additionally, the requirements for timeliness of the Motion to Set Aside the Default, the uncontroverted mistake by Petitioner, and a meritorious defense are all met in this case, thus, compelling this court to vacate

the Board of Bar Commissioners Order Affirming Findings of Fact, Conclusions of Law and Recommendation of Discipline, the Default Certificate and remand this matter tar a trial on the merits.

2. Under Point Two: It is fundamentally unfair and reversible error for the Board of Bar Commissioners to ignore Petitioner's Motion to Set Aside the Default Certificate. It is also fundamentally unfair that the Board of Bar Commissioners would enter a Default Certificate in this case where the Default Certificate was presented to the Board of Bar Commissioners before it had ruled on Petitioner's Objections to the Order granting Petitioner's Motion ~or Reconsider·ation.

ARGUMENT

THE DEFAULT AND RESULTING ORDER AFFIRMING FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF DISCIPLINE MUST BOTH BE SET ASIDE UNDER RULE 60(b), UTAH RULES OF CIVIL PROCEDURE FOR MISTAKE, INADVERTENCE.

A. The default was a direct result of a mistake and inadvertence.

Rule 60(b)(1), Utah Rules of Civi; Procedures is determinative of the issues presented on this appeal. Rule 60(b)(1) states, in part:

> On Motion and upon such terms as are just, the court may in furtherance of justice relieve a party or his legal representatives from the final judgment, order or proceeding for the following reasons: (1) mistake. inadvertence, surprise, or excusable neglect. (Emphasis added).

This court has held that Rule 60(b), Utah Rules of Civil Procedures, is a codification of the principal"that if default is issued when a party qenuinely is

mistaken to a point where. absent such mistake. default would not have occurred. the equity side of the court would grant relief. Such principal is codified in such Rules as 60(b), Utah R.Civ.P., reflecting that which is inherent in the judicial process." May v. Thompson, 677 P.2d 1109 (Utah 1984) (Emphasis added). The instant case is clearly on all fours with the policy acknowledged by this court as stated above. The Petitioner was served with the Summons and Formal Complaint on July 7, 1992. Record, pages 92, 93; 132 through 134; and 227 through 229. The Answer to the Formal Complaint was due on July 27, 1992. Between July 14, 1992 and July 17, 1992, Petitioner prepared the Answer in this matter, and three more documents, to wit: (1) a

Memorandum of Law in support of Petitioner's opposition to two charges of contempt of the Supreme Court to be presented to the Special Master, (2) a belated Notice of Suspension pursuant to Rule XVIII of the Procedure of Discipline of the Utah State Bar, and a (3) Notice of Compliance with Rule XVIII of the Procedure of Discipline of the Utah State Bar. Petitioner took all four documents for copying prior to serving them upon Bar Counsel. Record, pages 102 and 103.

After copying the four documents, petitioner put copies of each document in a large envelope to be delivered or served upon Bar Counsel. Petitioner also placed copies Original and copies of the other three documents in an envelope for the

Special Master. Unbeknownst to petitioner, he inadvertently placed the original and copy of the Answer back in his file. Record, pages 102 and 103.

Petitioner was not aware of his mistake until, August 5, 1992 when he received a copy, in the mail, of Bar Counsel's Request to Enter Default. Petitioner immediately filed the Original of the Answer and served a copy upon Mr. Wendell Smith, Assistant Bar Counsel. Record, pages 102, 103 and 135 and 136.

But for, Petitioner's mistake and inadvertence, the Answer to the Formal Complaint would have been timely filed on July 17, 1992; and accordingly, there would have been no default.

The petitioner's inadvertence in

misplacing the Original and copy of the Answer, intended for service upon Bar Counsel and Bar Director, resulting in a 9 days delay in filing the Answer, is exactly the type of mistake that Rule 60(b)(1) is meant to correct. As soon as petitioner discovered his mistake, he acted immediately to rectify the mistake by filing his Answer to the Formal Complaint. This court favors granting relief from a default judgment where any reasonable excuse is cffered by the defaulting party. Board of Education v. Cox, 384 P.2d 806 (Utah 1963). The petitioner has clearly met the threshold to be entitled to relief from the Default Certificate and the resulting Order affirming the Findings of Fact, Conclusions of Law and Recommendation

of Discipline.

B. Petitioner's Motion to Set Aside the Default Certificate was timely.

Rule 60(b), Utah Rules of Civil Procedures, requires that a Motion based on category (1) for mistake, inadvertence, ... must be brought no more than three months after the order was entered. The Petitioner's Answer was filed 9 days late. The Default Certificate was entered on July 31, 1992. Record, page 97. Petitioner's Motion to Set Aside the Default Certificate was filed 11 days later, on August 11, 1992. Accordingly, the Petitioner's Motion to Set Aside Default Certificate was timely filed.

C. Petitioner's denial of the charging allocations of the Formal Complaint sufficiently raised a meritorious defense.

As demonstrated above, but for,

Petitioner's mistake in misplacing the Answer to the Formal Complaint, there would have been no default. Secondly, the Petitioner's Motion to Set Aside the Default Certificate was timely. If the Motion is timely and Petitioner has shown excusable neglect, the next requirement is a 16 showing of a meritorious defense. State by and thru. Depart. of Social Services v. Mussel man, 667 P.2d 1053 (Utah 1983).

The Board of Bar Commissioners failed to hear Petitioner's Motion to Set Aside the Default Certificate, thus, Petitioner did not have an opportunity to present evidence in support of his claim to a meritorious defense. Accordingly, the Petitioner's Answer denying each and every charging allegation of the Formal Complaint should be

sufficient to raise a meritorious defense for purposes of setting aside the Default Certificate.

POINT TWO

THE PROCEDURE LEADING UP TO THE ORDER AFFIRMING THE FINDINGS OF FACT. CONCLUSIONS OF LAW. AND RECOMMENDATION OF DISCIPLINE WAS DEFECTIVE FOR TWO REASONS.

The Board of Bar Commissioners' ~aste to affirm th Findings of Fact, Conclusions of Law and Recommendation of Discipline ignores some basic fundamental principles of justice and fair play. The Board of Bar Commissioners entered its final Order Affirming the Findings of Fact, Conclusions of Law and Recommendation of Discipline notwithstanding that Petitioner's Motion to Set Aside the Default Certificate was still pending. Secondly, the Board of Bar

Commissioners enters its final Order Affirming the Findings of Fact, Conclusions of Law and Recommendation of Discipline notwithstanding that it was clear from the face of the pleadings that the default may have been improperly entered.

A. The Board of Bar Commissioners failed to hear Petitioner's timely filed Motion to Set Aside Default Certificate.

The Board of bar Comissioners have before it Petitioner's

timely filed Motion to Set Aside the Default Certificate. The Motion to Set Aside Default Certificate was filed on August 11, 1992. Record, pages 102 and 103. The Board of Bar Commissioners affirmed the Findings of Fact, Conclusions of Law and Recommendation of Discipline on September 3, 1992 (Record, pages 142 and 143) and ignoring the Petitioner's Motion to Set Aside the Default Certificate. It is fundamentally unfair that Petitioner is forced to expend time and money to appeal a matter that had been properly placed before the Board of Bar Commissioners and it chose to ignore it. The Petitioner respectfully prays the Court correct the injustice visited upon Petitioner and reverse the Order Affirming Findings of Fact,

Conclusions of Law and Recommendation of Discipline and remand the case for a trial on the merits.

B. The Petitioner's time to answer the Formal Complaint should not have run until 10 days after the denial of Petitioner's Objection to the Order granting Petitioner's Motion for Reconsideration.

On or about May 4, 1992, the Board of Bar Commissioners signed an Order Affirming the Findings, Conclusions and Recommendations of the Hearing Panel in this matter (the missing Order). On May 5, 1992, Petitioner filed a Motion for Reconsideration of said Order. Petitioner sought the following remedy: "to have the proposed Findings of Fact, Conclusions of Law and Recommendation of Discipline dismissed, the default vacated, and Bar Counsel ordered to effectuate adequate and

proper service of the Summons and Complaint upon the respondent". Record, pages 110 and 200. On May 19, 1992, Petitioner filed his memorandum of law in support of his Motion for Reconsideration and supporting affidavits. Record, 18 pages 111 through 126 and Pages 200 through 211. Petitioner~s motion was granted.

On June 8, 1992, The Board of Bar Commissioners signed an Order prepared by Bar Counsel granting Petitioner's Motion for Reconsideration. Record, pages 213 through 221. The Order clearly did not conform to the remedy that Petitioner sought in his Motion for Reconsideration which had been granted. on June 29, 1992, Petitioner filed his Objection to the Order that had been signed on the ground that the Order

failed to properly reflect the merits of the matter before the Board of Bar Commissioner. Record, pages 222 through 224. Since the Order erroneously required the Petitioner to file an Answer, Petitioner also filed a Motion to Quash the Summons. Record, pages 225 through -226.

Bar Counsel circumvented Petitioner's Objection by personally serving the Summons and Formal Complaint upon the Petitioner on July 7, 1992 before the Board of Bar Commissioners had ruled on Petitioner's Objection. Record, pages 92 and 93; pages 132 through 134; and pages 227 through 229. On August 10, 1992, the Board of Bar Commissioners over-ruled Petitioner's Objection on the ground that it was moot, since Petitioner had been personally served

on July 7, 1992. Record, page 137.

Because the issue of Service of the Summons and Formal Complaint was properly before the Board of Bar Commissioners on Petitioner's Objections to the Order granting Petitioner's Motion for Reconsideration, it is only fair that Petitioner's time to answer the Formal Complaint should not run until after the Board of

Bar Commissioners rule on the Objection. This situation parallels a Motion under Rule 12, Utah Rules of Civil Procedure. While the motion is pending before the court, the parties remain in status quo until the court rules on the motion. If the Rule 12 Motion is denied, the defendant is allowed 10 days from the date of the Order denying the motion to file his Answer to the Complaint.

The Board of Bar Commissioners denied Petitioner's Objection on August 10, 1992. Record, pages 102 and 103. Accordingly, the time for petitioner to answer the Formal Complaint would not have run until August 20, 1992. Thus, the August 5, 1992 filing date was clearly timely.

CONCLUSION

Rule 60(b)(1), Utah Rules of civil

Procedure is controlling and should be invoked to reverse the Board of Bar Commissioner's Order affirming the Findings of Fact, Conclusions of law and Recommendation of Discipline on the basis of mistake and inadvertence. The defects in the procedure before the Board of Bar Commissioners also requires a reversal of its Order affirming Findings of Fact, Conclusions of Law and Recommendation of Discipline and the Default Certificate.

Dated this, day of February, 1993.

_____

A. Paul Schwenke

CERTIFICATE OF HAND-DELIVERY

I hereby certify that I hand-delivered 4 opies of the foregoing Brief of Petitioner to Mr. Wendell K. Smith,

Assistant Bar Counsel at 645 South 200 East, Salt Lake City, Utah 84111, and the original and 9 copies to Honorable Geoffrey J. Butler, Clerk of the Supreme Court, at 332 State Capitol, Salt Lake City, Utah 84114, this day of February, 1993.

_____

A. Paul Schwenke

IN THE SUPREME COURT OF THE STATE OF UTAH

A. PAUL SCHWENKE,	PETITIONER'S REPLY BRIEF
Petitioner	No. 920480
UTAH STATE BAR,	Case No. Below: F-322
Respondent.	Priority 5

APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF DISCIPLINE BY THE BOARD OF COMMISSIONERS OF THE UTAH STATE BAR.

Wendell K. Smith, #3019
Office of Bar Counsel
645 South 200 East
Salt Lake City, Utah 84111

Attorney for Respondent
A. Paul Schwenke #3951
75 East 400 South #202
Salt Lake City, Utah 84111

Petitioner.

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ISSUES RAISED BY RESPONDENT'S BRIEF

Respondent's brief raised six issues restated here as follows:

1. Was Appellant properly served with the Summons and Formal Complaint in the above-entitled action? The documents were sent by certified mail to his last known actual address on December 4, 1990, which was approximately six (6) weeks before he left the State of Utah.

2. Was Appellant properly served with the Summons and Formal Complaint, Notice of Intent to Default, and Default, when the documents were sent by certified mail to his

last known actual address with arrangements having been made to have such documents forwarded to Appellant?

3. Can Appellant defeat service of the Summons and Formal Complaint, Notice of Intent to Default, and Default in this disciplinary action by leaving the State of Utah and failing to keep the Bar informed as to his location and current address?

4. Was the finding of the Hearing Panel and the Board of Bar Commissioners that the Appellant had been properly served with the Summons and Formal Complaint when they were sent by certified mail to Appellant's last known address clearly erroneous?

5. Was the decision of the Board of Bar Commissioners to approve the

Findings, conclusions, and Recommendations of the Hearing Panel after Appellant's second default clearly erroneous?

6. Was the Appellant, notwithstanding his default, afforded a fair hearing on the merits of this complaint?

Of the six issues raised, only issue #5 is relevant to this appeal. Issue #5 is addressed in Petitioner's brief and will not be further addressed here. Issues 1, 2, 3, 4, and 6 raised matters that had been before the Board of Bar Commissioners ("Board") and after a hearing the Board adjudicated said issues in favor of Petitioner. The time for Respondent to appeal the Board's adjudication of said issues has long pass and the Respondent is barred from raising them here. Accordingly, the issues to be

addressed in this Petitioner's Reply Brief are as follows:

1. Is respondent barred from raising issues #1, 2, 3, 4, and 6 by the applicable statute of limitation and doctrine of waiver?

2. Is respondent barred from raising issues #1, 2, 3, 4, and 6 by the doctrine of resjudicata or collateral estoppel?

CONCISE STATEMENT OF APPLICABLE FACTS

1. Following a sanctions hearing before the Hearing Panel on March 2, 1993 and the service of the panel's Findings, Conclusions and Recommendation, Petitioner timely file pursuant to Rule XII, Procedures of Discipline of the Utah State Bar, a Motion for Reconsideration. Record, pages

110 and 200. Appendix A. Petitioner also submitted a supporting memorandum. Record, pages 111 through 123 and pages 201 through 211. Appendix B(1,2&3)

2. Issues 1, 2, 3, 4 and 6 raised by Respondent here were all properly before the Board pursuant to Petitioner's Motion for Reconsideration below.

3. After a full hearing wherein Bar Counsel made the same arguments that he is raising as issues 1, 2, 3, 4 and 6 here, the Board rejected Bar Counsel's argument and granted Petitioner's Motion for Reconsideration on June 8, 1992. Record, pages 213 through 221. Appendix C.

4. The last day to appeal the Board's order granting Petitioner's Motion for Reconsideration was July 7, 1992

pursuant to Rule XIV, Procedures of Discipline of the Utah State Bar.

ARGUMENT

1. **Respondent, Utah State Bar, is barred by the statute of limitation and the doctrine of waiver from asserting issues 1, 2, 3, 4 and 6.**

Rule XIV, Procedures of Discipline of the Utah State Bar provides for review by the Supreme Court of findings, conclusions and recommendations of the Board. The rule sets for a limitation period of 30 days for which the attorney subject to the disciplinary proceeding or bar counsel to appeal the rulings of the Board.

> (a) Review on appeal. Within 30 days after service of findings, conclusions and a recommendation of the Board upon the attorney in question and Bar Counsel, the attorney or Bar Counsel (the latter acting at the express

direction of the Committee) may seek review by the Supreme Court by a written notice of appeal with the Clerk of the Supreme Court...

On June 8, 1992 and after a full hearing by the Board of the Petitioner's Motion for Reconsideration, wherein Bar Counsel made the same arguments that it is now attempting to raise on this appeal as issues 1, 2, 3, 4 and 6, the Board rejected said arguments and granted Petitioner's Motion for Reconsideration vacating the previously entered default and Hearing Panel's Findings, Conclusions and Recommendation. The latest date for Bar Counsel to file its Notice of Appeal of said ruling was July 7, 1992. Bar Counsel choose not to appeal said ruling but instead proceeded with personal service of the

summons and formal complaint on Petitioner on July 7, 1993.

Accordingly, Respondent is barred by Rule XIV from asserting issues 1, 2, 3, 4 and 6 on this appeal. Furthermore, Bar Counsel waived any objections to the Board's determination of said issues when Bar Counsel chose to serve Petitioner with the summons and complaint rather than filing a Notice of Appeal.

2. Respondent, Utah State Bar, is barred by the doctrine of Collateral Estoppel from asserting issues 1, 2, 3, 4 and 6.

The doctrine of collateral estoppel or more accurately described as the issue preclusion branch of the doctrine of re judicata is well settled and recognized in this state. Madsen v. Borthick, 769 P.2d

245 (Utah 1988) citing Noble v. Noble, 761 P.2d at 1374 n.5; Wilde v. Mid-CenturY Ins. Cco., 635 P.2d 417, 419 (Utah 1981) and Searle Bros. ~v. Searle, 588 P.2d 689, 691 (Utah 1978). The doctrine serves to bar subsequent relitigation of issues previously decided in another action where four requirements are met. First, the issue in both cases must be identical. Second, the judgment must be final with respect to that issue. Third, the issue must have been fully, fairly, and competently litigated in the first action, and fourth, the parties must be the same or their privies.

The parties before the Board and this court are identical. The matter was fully briefed and a full two to three hour hearing was conducted before the Board. The

Board's findings and conclusions granting Petitioner's Motion for Reconsideration and vacating the first default was final. The issue before the Board and the issues 1, 2, 3, 4 and 6 raised by Respondent here are identical. The Petitioner's Motion for Reconsideration before the

Board below was based primarily on his challenge to the entry of default and all proceedings pursuant to the improperly entered default. Bar Counsel opposed the Motion for Reconsideration raising, among other arguments, the same arguments that Respondent now is raising here as issues 1, 2, 3, 4 and 6. Notwithstanding Bar Counsel's opposition, the Board correctly granted Petitioner's Motion for Reconsideration and

vacated the default and all proceedings pursuant thereto, i.e. the sanctions hearing and the Hearing Panel's Findings, Conclusions and Recommendation. Accordingly, these issues (Respondent's issues 1, 2, 3, 4 and 6) are barred from consideration on this appeal by the doctrine of collateral estoppel.

CONCLUSION

Respondent's issues 1, 2, 3, 4 and 6 raised in Appellee's brief re-visiting matters that had been fully and fairly adjudicated by the Board are barred by the statute of limitation, doctrine of waiver, and the doctrine of collateral estoppel.

Dated this 30th day of August, 1993.

_____

A. Paul Schwenke
Petitioner

CERTIFICATE OF MAILING

I hereby certify that I hand-delivered 4 copies of the foregoing Petitioner's Reply Brief to Mr. Wendell K. Smith, Assistant Bar Counsel at 645 South 200 East, Salt Lake City, Utah 84111, and the original and 9 copies to Honorable Geoffrey J.Butler, Clerk of the Supreme Court, at 332 State Capitol, Salt Lake City, Utah 84114, this 30th day August, 1993.

_____

A. Paul Schwenke

A. Paul Schwenke #3951
Attorney Pro Se
75 East 400 South #203
Salt Lake City, Utah 84101
Telephone: 801 530-0100
Telecopier: 801 530-0900

IN THE UTAH SUPREME COURT

In the Matter of the Complaint by CAREN SERR, against A. PAUL SCHWENKE, DOB: 10-12-51 ADM: 05-09-83 Petitioner, vs. Utah State Bar, Respondent.	**MOTION TO STRIKE APPELLEE'S BRIEF.** No. 920480 Case Number below: F-322

A. Paul Schwenke, Petitioner, appearing Pro Se, respectfully moves the court, pursuant to Rules 23 and

24, Utah Rules of Appellate Procedure, to strike Appellee's brief and Supplement on the ground that Appellee's brief is in violation of Rule 24 (e). Further, Petitioner moves for an award of attorney fees under Rule 24(k). As further grounds, Petitioner alleges that Appellees violation of Rule 24(e) has caused him unfair prejudice and disadvantage. The Appellee has presented numerous factual assertion not contained in the record before the court and any facts that maybe part of the record are not cited to, thus living petitioner to wonder if these facts are truly before the court.

Accordingly, if the court considers the evidence relied on by Appellee, Petitioner will be prejudiced and put at a substantial

disadvantage because some if not most of the evidence relied upon by the Appellee may or may not be before the court. If Appellee is permitted to do so, than it is only fair that petitioner submit any extraneous evidence that would be helpful to his cause. Naturally, such an unmanageable outcome is the wisdom in Rule 23(e) to restrict the parties to the record. Since Appellee clearly violated Rule 23(a) by failing to cite to the record, the Appellee's brief should be stricken and Petitioner awarded his attorney fees. In this respect, petitioner alleges that one hour of attorney time was spend to prepare this motion at the fair rate of $120.00 per hour and copy costs of $2.00.

Respectfully submitted this __ day of

May, 1993.

A. Paul Schwenke

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage pre-paid, copies of the foregoing Memorandum of Points and Authorities in Support of Petitioner's Motion to Strike Appellee's Brief and for Attorney Fees to Mr. Wendell K. Smith, Assistant Bar Counsel, and to the Executive Director, both at 645 South 200 East, Salt Lake City, Utah 84111, this __ day of May, 1993.

Wendell K. Smith #3019
Assistant Bar Counsel
OFFICE OF BAR COUNSEL
645 South 200 East
S.L.C., Ut. 8411-3834
801-531-9110

IN THE SUPREME COURT
OF THE STATE OF UTAH

In the Matter of the Complaint by	) RESPONSE TO) APPELLANT'S) MOTION TO STRIKE) APPELLEE'S BRIEF
against	) F-322
A. PAUL SCHWENKE DOB: 10-12-51 ADM: 05-09-83	)

THE OFFICE OF BAR COUNSEL by and through Wendell K. Smith, Assistant Bar Counsel, submits the following response in objection to Appellant's Motion to Strike Appellee's Brief.

Appellant has made the general

allegation that Appellee has not complied with Rule 24(e) of the Utah Rules of Appellate Procedure. However, Appellant has not identified any specific instances where this has occurred, has not identified alleged factual assertions that are not in the record, and has not specified how he has been unfairly prejudiced and damaged. Consequently, the Office of Bar Counsel cannot respond to these allegations.

The brief submitted by Appellee referred to the record of the March 2, 1992, hearing which apparently had not been paginated pursuant to Rule 11(f), otherwise, all references were to appendices of Appellee's Brief, or to matters contained in Appellant's Brief. Appellant was provided a copy of Appellee's Brief with Appendices.

If he believed that Appellee's Brief contained matters that were not of record, or that he had somehow been prejudiced by the format of Appellee's Brief, he should have submitted these matters in a reply brief.

The Office of Bar Counsel prays that Appellant's motion be denied.

Dated this 11th day May, 1993.

OFFICE OF BAR COUNSEL

_____

Wendell K. Smith
Assistant Bar Counsel

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Response to Appellant's Motion to Strike Appellee's Brief to A. Paul Schwenke, at 75 East 400 south #202, SLC, Ut. 84111, on this 12th day of May, 1993.

_____

IN THE SUPREME COURT
STATE OF UTAH
332 STATE CAPITOL
SALT LAKE CITY, UTAH 84114

JUNE 21, 1993

OFFICE OF THE CLERK

A. Paul Schwenke
Attorney at Law
75 East 400 South, #202
Salt Lake City, Utah 84111

In re: A. Paul Schwenke
F-322 No. 920480

Motion to strike appellee's brief is denied. Appellee is ordered to file an amended brief correcting the deficiencies.

Motion to award attorney's fees is denied.

Geoffrey J. Butler
Clerk

Wendell K. Smith, #3019
Assistant Bar Counsel
OFFICE OF BAR COUNSEL
645 South 200 East
Salt Lake City, Utah 84111
(801) 531-9110

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In the Matter of the
Complaint by

CAREN SERR
against

A. PAUL SCHWENKE,
DOB: 10-12-51
ADM: 05-09-83

AFFIDAVIT OF
JAMES Z. DAVIS

F-322

STATE OF UTAH :
ss
COUNTY OF SALT LAKE :

The affiant, James Z. Davis, being first duly sworn deposes and states:

1. I am an attorney admitted to practice law in the State of Utah.

2. I was the President of the Utah

State Bar and presiding at the meeting of the Board of Bar Commissioners of the Utah State Bar on May 28, 1992. On that date Respondent appeared before the Board to present oral argument on his Motion for Reconsideration wherein he sought to have the Board to Reconsider the Order entered by the Board on May 4, 1992, affirming the Findings of Fact, Conclusions of Law and Recommendation of Discipline entered by the Hearing Panel in this action.

3. Respondent raised two issues in his Motion. He alleged that the proceedings were defective because he and [sic] not been served with the summons and formal complaint by mailing a copy to his last known address as shown on the roster of attorneys of the Bar and that the action of the Hearing Panel

which considered his case on March 2, 1992, was based on racial prejudice.

4. During the hearing before the Board Respondent withdrew his allegation that the decision of the Hearing Panel was based on racial prejudice. This left only the issue regarding service of process.

5. Respondent admitted that he was present at the hearing on his case on March 2, 1992, that he participated in that hearing and presented matters in his own defense.

6. Respondent admitted that he now had in his possession a copy of the summons and formal complaint issued against him in the above-entitled action.

7. The Board found that Respondent had been properly served by mailing a copy

of the summons and formal complaint to the office of Jamis Johnson where Respondent had been practicing law and where arrangements had been made by Bar Counsel to have the documents forwarded to Respondent. The Board found that Respondent currently had possession of a copy of the summons and formal complaint, was aware of the nature of the charges against him, that he had already participated in a trial on the merits of his case and had the opportunity to present matters in defense, extenuation, and mitigation, and that he was not entitled to the relief he requested as a matter of law. However, the Board concluded in the interests of fairness they would grant him a second hearing on his case at such time as he filed his Answer. Accordingly, he was

ordered to file his Answer to the formal complaint within ten (10) days.

8. Neither Respondent or a representative of the Office of Bar Counsel was present during the deliberations of the Board regarding Respondent's Motion.

9. When the decision was reached I instructed Assistant Bar Counsel, Wendell K. Smith, to draft the Findings of the Board and an Order based upon the decision of the Board. Attached to this Affidavit as Exhibit A, and incorporated herein, is a copy of the Order I signed on June 8, 1992, and it accurately reflects the decision of the Board of Bar Commissioners.

Dated this 12 day of November, 1992.

_____

James Z. Davis

Subscribed and sworn before me this 12th day of November, 1992.

_____

Notary Public
Residing in Weber County

SEAL

Wendell K. Smith, #3019
Assistant Bar Counsel
OFFICE OF BAR COUNSEL
645 South 200 East
Salt Lake City, Utah 84111
(801) 531-9110

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In the Matter of the
Complaint by

CAREN SERR
against

A. PAUL SCHWENKE,
DOB: 10-12-51
ADM: 05-09-83

AFFIDAVIT OF
JAMES Z. DAVIS

F-322

STATE OF UTAH :
ss
COUNTY OF SALT LAKE :

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Dated this 12 day of November, 1992.

_____

James Z. Davis

Subscribed and sworn before me this 12th day of November, 1992.

_____

Notary Public
Residing in Weber County

SEAL

IN THE SUPREME COURT
OF THE STATE OF UTAH

In the matter of the
Complaint by

CAREN SERR	CERTIFICATE OF READINESS FOR SUPREME COURT REVIEW
against	
A. PAUL SCHWENKE DOB: 10-12-51 ADM: 05-09-83	F-322

COMES NOW, John C. Baldwin, Executive Director of the Utah State Bar and hereby certifies that the Order and Recommendation for the Order of Discipline: Disbarment was mailed postage prepaid to the Respondent on September 9, 1992 at his address as reflected in the official Attorney Registry of the Utah State Bar and that the Respondent has not filed a Petition for Amendment, Modification or Reconsideration

as required by Rule XII(f).

DATED this 16th day of October, 1992.

_____

John C. Baldwin
Executive Director.

SUPREME COURT OF UTAH
STATE OF UTAH
SALT LAKE CITY, UTAH
October 23, 1992

OFFICE OF THE CLERK

A. Paul Schwenke
Attorney at Law
75 East 400 South, #302
Salt Lake City, Ut. 84111

In re: A. Paul Schwenke
F-322 No.920480

Pursuant to Rule 13 of the Utah R. App. P. the record on appeal has been filed. The appellant's brief is due December 2, 1992. The record in this case may be withdrawn from the Supreme Court only upon written request of the attorney of record.

GEOFFREY J. BUTLER

CLERK